REPORT ONE

Pacific Peoples and the Criminal Justice System in Aotearoa New Zealand

Written by Litia Tuiburelevu, Elizabeth Lotoa, Isabella Ieremia,
Hugo Wagner-Hiliau & Gabriella Coxon-Brayne

With contributions from The University of Auckland Equal Justice Project

Michael & Suzanne Borrin Foundation

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Waipapa Taumata Rau
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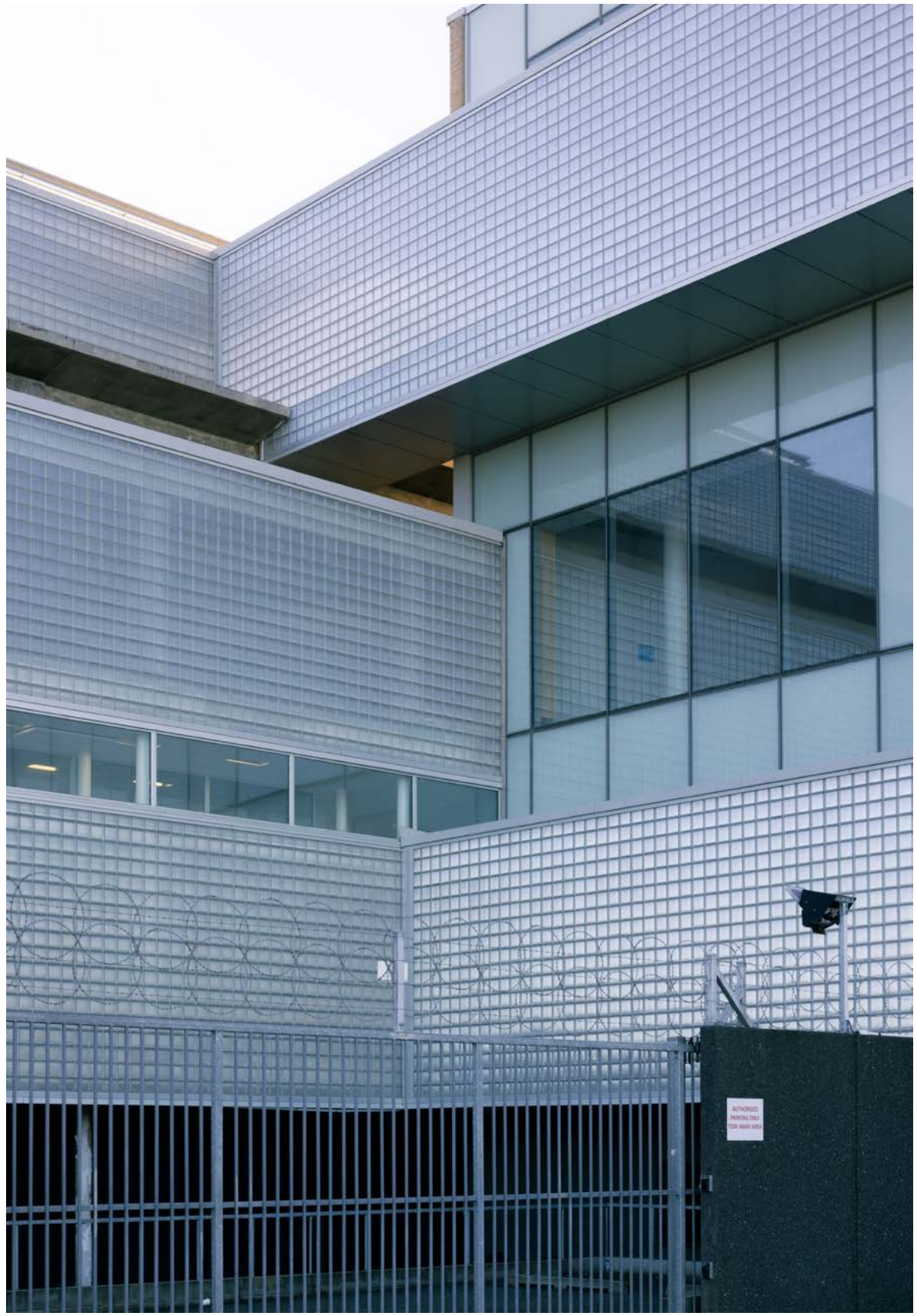
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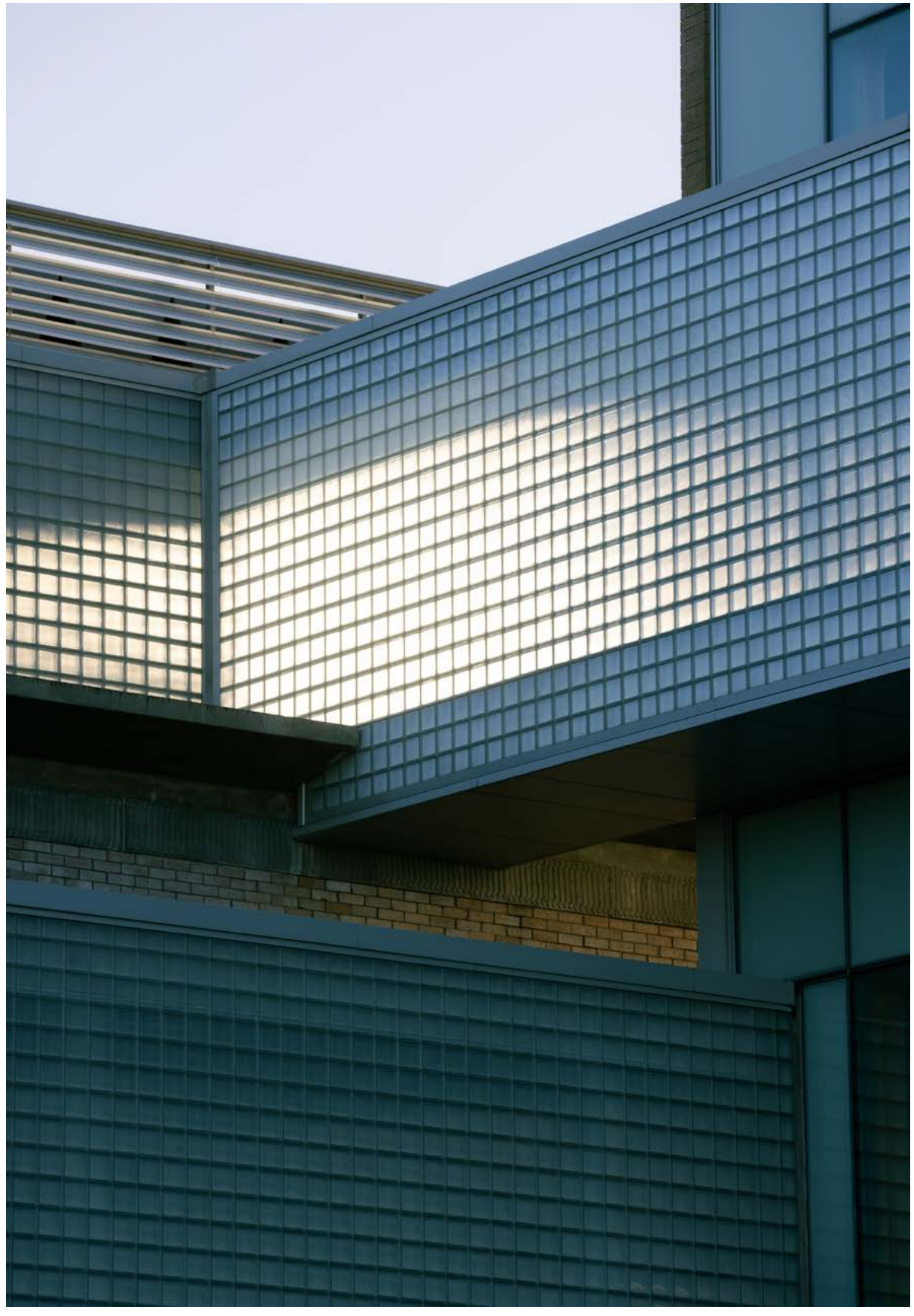



EXIT


Manukau District Court

DISCLAIMER

The writing of this report concluded in July 2022. Given the ongoing research developments in this space, we acknowledge that some information may be less up-to-date. The views expressed are not those of the Michael and Suzanne Borrin Foundation or the University of Auckland. All mistakes are the authors'.

Acknowledgements

We acknowledge Ngāti Whātua ki Ōrākei as the enduring kaitiaki over the lands and waters where this report was prepared.

This research project owes its shape to Moana Jackson's seminal research, *He Whaipaanga Hou*,[1] and to some further writings. Words cannot express our enormous gratitude for Moana's generous wisdom. Moe mai rā e te Rangatira. To Dylan Asafo, thank you for reviewing the first draft of this Report and constantly pushing us to be bold, unwavering, and imaginative.

We thank all those who supported this research, including our families, friends, and colleagues who offered their time, encouragement, and camaraderie. We would especially like to acknowledge the support of Charlotte Bennett, Robson Chiambiro, Dr Jane Kelsey, Dr Patrick Thomsen, and Dr Sereana Naepi.

We thank the University of Auckland's Equal Justice Project for providing their research expertise across this project. Their work has helped elevate this report exponentially. We thank Alison Warren for her proofreading work and Althea Tarrosa for her thorough editorial assistance.

We thank the amazing team at Alt Group who designed this Report.

Last but certainly not least, we offer a hearty Fa'afetai tele lava, Vinaka vaka levu and Malo 'Aupito to the Michael and Suzanne Borrin Foundation for making this project possible and their commitment to funding transformative legal research in Aotearoa New Zealand.

1 Moana Jackson *The Maori and the Criminal Justice system: A New Perspective – He Whaipaanga Hou* (Policy and Research Division, Department of Justice, Study Series 18: Part 1, February 1987) [Jackson (1987)]; and Moana Jackson *The Maori and the Criminal Justice system: A New Perspective – He Whaipaanga Hou* (Policy and Research Division, Department of Justice, Study Series 18: Part 2, November 1988) [Jackson (1988)].

Research Foundations

Introduction

In 1979, Nainoa Thompson was preparing to voyage from Hawai'i to Tahiti by non-instrumental navigation. If successful, Thompson would be the first Kānaka Māoli[1] since the 14th century to complete an open-ocean voyage. Under the mentorship of the renowned Satawal Wayfinder Pius "Mau" Piailug, the pair ventured to the Lana'i lookout on Oahu's south-eastern shore days before Thompson's departure:[2]

> "Can you point to the direction of Tahiti?" Mau asked.
> Thompson pointed Southeast toward Pape'ete.
> "Can you see the island?"

Thompson paused, perplexed by Mau's request. How could he 'see' an island 2,200 miles away? He gazed into the horizon before finally responding,

> "I cannot see the island, but I can see an image of the island in my mind."
> "Good. Don't ever lose that image or you will be lost", Mau replied.

In writing this report, we frequently returned to this wayfinding exchange as a reminder to set forth on our research journey with focused intention, trusting that the process will land us on the right shores.[3]

This project, to our knowledge, is the first qualitative research report on Pacific people's experiences of the criminal justice system (justice system) in Aotearoa New Zealand. Being the 'first' is not a cause for celebration; it is an indictment of the legal profession's failure to support, resource and publish research on Pacific peoples and the law. Our discomfort with the label of 'first' is how it erases the many contributions by Pacific thinkers, writers, artists, and grassroots activists who have engaged with these issues outside of the academy's walls. Sadly, much of their work has been buried under the weight of government bureaucracy, relegated to library catalogues, lost to the tides of time, or dismissed for their lack of 'academic' status.[4]

In locating these many and varied contributions, our research process was akin to an excavation, unearthing historical artefacts, removing their debris, and placing them under a spotlight to re-examine with fresh eyes. We locate this work inside the primordial knowledge pool, existing behind, in front of, within and around the others all at once:[5] a vortex of conversations as opposed to an ascending vector.[6]

As we wrote, we had to resist the urge to over-explain every issue, argument, theory, and article related to this topic. We took a pause and (re)reflected on Hana Burgess,

1 Kānaka Māoli is someone of Indigenous Hawaiian descent.
2 Jeff Moag "Mau Piailug, One of the Last Wayfinders, Followed the Stars to Tahiti" (15 March 2019) Adventure Journal <www.adventure-journal.com>.
3 'We' is the research team. 'I' is Litia.
4 'Works' is broadly defined to include writing, art, poetry, essays, newsletters, posters, hand-outs, speeches, periodicals, Hansard records, government reports/discussion papers, testimonies, videos/film, music lyrics, Tweets, and magazine articles.
5 This thought was inspired by Talia Marshall's essay: Talia Marshall "Talia and the Pākehās" (17 November 2021) Newsroom <www.newsroom.co.nz>.

Donna Cormack, and Paparaangi Reid's brilliant article "Calling Forth Our Pasts, Citing Our Futures: Envisioning of a Kaupapa Māori citational practice."[7]

Although writing vis-à-vis Kaupapa Māori research, their words are a timely reminder for us to cite in good relation, "with those who have shaped our knowledge, those whom we do our work for, and those who will engage with our work in the future."[8] This prompted us to reconsider how we call forth those who have unravelled the many knotty issues. Rather than thinly rehashing their work, we invite readers to engage with the work in all its nuances. Where the work is archived, inaccessible to the public, or rarely discussed in the literature, we expand on it in greater detail.

This research is not the defining statement of Pacific peoples and the justice system. It attempts to collate the existing knowledge, identifying what exists, what is absent and what must be learned. We hope it provokes more questions than answers, unravelling the possibilities on our collective voyage towards a new terrain of justice.

Relationality

Legal writing is often wrapped in arrogance, assuming the role of an omniscient voice-of-God narrator looking down on those it discusses. Throughout law school, we were told that "good" legal writing avoids the evil "I", favouring mealy-mouthed, third-person phrases spoken by the all-seeing, all-knowing "one." As Pacific peoples, we are all too familiar with others weaponising their 'objectivity' to speak over and about our communities with self-professed authority. For Indigenous[9] scholars who write within and about their communities, this approach is entirely at odds with our ways of knowing, being and doing.[10] As Chickasaw scholar Eber Hampton contends:[11]

Emotionless, passionless, abstract, intellectual research is a goddamn lie, it does not exist. It is a lie to ourselves and a lie to other people. Humans—feeling, living, breathing, thinking humans—do research. When we try to cut ourselves off at the neck and pretend an objectivity that does not exist in the human world, we become dangerous, to ourselves first, and to the people around us.

The intention of our reflexive practice is to forefront our positions by offering a self-conscious assessment about how our views, upbringings and beliefs might directly or indirectly influence this work.[12]

We do not brandish our cultural heritage as badges of authenticity and expertise; we are acutely aware of "the ethical predicaments that result from speaking as oneself, as simultaneously part of a collective with internal disputes."[13] There is not a singular Pacific way nor worldview. We are complex, multidimensional and contradictory. Because of this, we write into the collective chaos by speaking to "we/ours" rather than "them/theirs."

6 Jackson (1987), above n 1.
7 Hana Burgess, Donna Cormack and Papaarangi Reid "Calling Forth Our Pasts, Citing Our Futures: Envisioning of a Kaupapa Māori citational practice" (2021) 10 MAI Journal 57.
8 At 61.
9 Although Pacific peoples are not indigenous to Aotearoa, they are indigenous to their islands in Te Moana-nui-a-Kiwa and are thus encapsulated within 'Indigenous' in this context.
10 Linda Tuhiwai Smith *Decolonising Methodologies* (Bloomsbury Publishing, London, 1999).

Litia Tuiburelevu
Fijian, Tongan, Pākehā, she/her

I descend from the islands of Viti Levu (Bau), Tonga, and Britain. My mother's side is Pākehā, and my father is iTaukei Fijian and Tongan. I was born, raised, and educated in Tāmaki Makaurau and move between blended families on both sides. I have an affinity for Pacific stories and am drawn to work that is deeply embedded in our cultures and communities. While I identify as part of Aotearoa New Zealand's Pacific diaspora, I cannot relate to the migration narrative that typifies much of the Pacific experience given my existence on this whenua is by way of British settlers. Although Pacific peoples' ways of arriving to Aotearoa cannot be collapsed into a single story (especially one commensurate with struggle), being outside of the immigrant experience limits my understanding of some of the unique challenges Pacific immigrants face past and present.

My cultural, educational and employment histories deeply influence my theoretical lenses and app-roach to this work. I currently work as a research fellow at my alma mater, and prior to this, I worked at the Crown solicitor's office as a junior lawyer in the criminal team.

I am frank about the intersecting privileges I am afforded in this research context. Neither I (nor anyone in my immediate family/friend group) has been arrested, prosecuted, and sentenced by the justice system, nor have we/I been a victim of crime. My suburban, middle-class upbringing meant I was largely insulated from the system's incursions. Police did not roam the streets I played, I never saw the inside of a courtroom, and I believed jail was where the "bad guys" lived. The system existed outside of me. And as I would come to learn, this was entirely by design.

Throughout my teens and into my early twenties I was an avid consumer of American dramas — from film noir crime thrillers to television epics like *The Sopranos*, *The Wire* and *Breaking Bad* — such that my understanding of the justice system was tainted by Hollywood's brush. Given that much of this material did not paint the justice system, especially law enforcement, in a favourable light, I often compared Aotearoa New Zealand to the United States of America; believing, however naively, that our system was somehow better, fairer, and more 'just' than compared to theirs. It was not until I was at university that I had a much-needed rude awakening about the workings of our justice system thanks to the teachings and writings of Indigenous Māori scholars including Moana Jackson, Nin Thomas, Khylee Quince, Ani Mikaere, Margaret Mutu and Pākehā scholars including Jane Kelsey and Julia Tolmie.

In the final year of my undergraduate degree, I was introduced to critical race theory and prison abolitionist scholarship by Pacific law lecturers Dylan Asafo and Helena Kaho. As excited as I was to learn, I was not yet ready to commit to the (very necessary) demands abolition required. At the very least, though, the seed was planted.

11 Eber Hampton "Memory Comes Before Knowledge: Research May Improve if Researchers Remember their Motives" (1995) 21(Supplement) Canadian Journal of Native Education 46 at 52 as cited in Shawn Wilson *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing, Canada, 2008) at 56.
12 Andrew Gary Darwin Holmes "Researcher Positionality – A Consideration of Its Influence and Place in Qualitative Research – A New Researcher Guide" (2020) 8 Shanlax International Journal of Education 1 at 2.
13 Eve Tuck and K Wayne Yang "R-Words: Refusing Research" in Django Paris and Maisha T Winn (eds) *Humanizing Research: Decolonizing Qualitative Inquiry with Youth and Communities* (SAGE Publications, California, 2014) 289 at 308.

Working for a law firm was a site of productive tension; like many young, brown law graduates, I ent-ered the profession hoping to usher change from the "inside-out", seduced by the catch cry of the diversity/equity/inclusion industrial complex which touts that "more brown people at the table" is somehow the cure-all for structural inequities. As I moved away from the profession and into the academy, I continued to engage with abolitionist scholarship, understanding that the appeals for justice system 'reform' were simply untenable. This is not to suggest that the academy is inherently more virtuous. However, here I am free to be a conscious critic and explore radical possibilities with colleagues and students. As the inimitable bell hooks' wrote, "[t]he classroom remains the most radical space of possibility in the academy."[14] My intention for this research is to be bold, compassionate, and uncompromising in my integrity.

Elizabeth Lotoa
Sāmoan, Pākehā, she/her

I (Liz) am Samoan and Palagi. My father Fa'asalele Lotoa was born and raised in Lufilufi on Upolu. He migrated to Aotearoa New Zealand in 1986 and worked in the Hansen and Berry factory in South Auckland until my sister and I were born. My mother Susan Lotoa was born and raised in Otara, South Auckland and teaches English to adults who have English as their second language at the Manukau Institute of Technology in Otara. Due to my parent's intimate lifelong connections with South Auckland, I was raised in Papatoetoe and still reside there.

I consider myself an Aotearoa New Zealand -born afakasi who is incredibly proud of their Samoan heritage. When my father migrated to Aotearoa New Zealand, he did so with the mindset that succeeding here would only result from assimilating into the Pālagi world. Consequently, my knowledge of the Samoan language and customs is limited and often humiliating. However, I have never shied away from my identity and recognise that this lack of cultural connection is common for some members of the Pacific diaspora. In terms of my experience with the justice system, it is limited as I have never entered the system nor has my immediate family. I was incredibly lucky to grow up with my siblings as the first generation out of a cycle of poverty. I have been privileged enough to pursue an education that allows me to view experiences of the justice system through a secondary lens rather than through my own experiences. However, growing up in South Auckland, I was exposed to a certain degree of crime, and it is not uncommon to hear police sirens and the Eagle helicopter flying above multiple times a day. My house was once featured in the background of a Police Ten 7 segment. It is also not uncommon to hear of friends from primary school entering the system or pursuing a gang-affiliated life. Consequently, my perceptions of the justice system and the police have been influenced, and are limited, by these experiences.

Isabella Ieremia
Sāmoan, Pākehā, she/her

Malo le soifua, my name is Isabella Ieremia and I was born and raised in central Tāmaki Makaurau and continue to call Tāmaki my home. My father, Neil, was born and raised in Cannons Creek, Porirua and my mother, Jessica, like me, was born and raised in central Tāmaki. On my father's side, we hail from the shores of Sāmoa, descending from the villages of Lepea and Matautu, Falealili. I am pākehā on my mother's side, with American, English, Irish and Jewish lineage. As an Aotearoa New Zealand born afakasi, my knowledge of our language and customs is limited. However, like Liz, I am proud of my Samoan heritage and stand strong in my identity.

Both of my parents worked tirelessly to provide my siblings and me with a solid upbringing and have spent the majority of their careers working in Aotearoa's creative industries. As a result of their hard work, and my grandparents before them, I have led a privileged life and my experience of Aotearoa New Zealand's justice system is largely that of an observer. Growing up in Tāmaki I have always been aware of the stories and experiences of our Moana peoples residing in Aotearoa. My parents have been staunch advocates for the social issues affecting our communities and have encouraged political awareness and critical thinking from a young age. My understanding of the justice system and our Moana peoples has been bolstered by my time at university, but I acknowledge that this knowledge is largely theoretical.

I am truly honoured to be a part of this project and to have had the opportunity to serve our Moana communities alongside Litia, Liz, Hugo and Gabriella. I hope this mahi will serve our people long into the future and help to ignite the overdue and necessary change that is needed to achieve justice for all in our system.

Gabriell Brayne
Samoan, Māori, Pākehā, she/her

Kia ora tātou, ko Gabriella Makerita Hinetu Brayne ahau. I whakapapa to Samoa (Falefa, Faleapuna and Mota'a), Ngāti Maniapoto and Scotland on my mum's side of the whānau and Ireland on my dad's side. My maternal nan migrated from Samoa to Aotearoa in the 1960s, where she met my koro and eventually gave birth to my mother in Tokoroa. Whilst my nan was not directly affected by the Dawn Raids, this history features in the stories she shares of our aiga at the time (some of whom were part of the Polynesian Panthers) and the lengths taken to support our relatives racially targeted by law enforcement. My nan was told by Palagi teachers not to teach her kids Samoan as it would 'ruin' their English, so unfortunately our Gagana Samoa (and much of the Fa'a Samoa) was not passed down.

My paternal grandparents also have a close relationship with Te Moana-Nui-a-Kiwa, with my grandmother working as an educationist within the region. Because of this connection, my dad went to high school at 'Atenisi in Tonga which sparked his lifelong interest in revolutionary politics and later became a trade unionist and activist in the Philippines. I was raised by my incredible solo mum in our family home in Massey, West Auckland. Things were not always easy for mum, especially navigating the welfare system before becoming a primary school teacher, but it is thanks to her and my whānau that I have always been well supported in my education and other life opportunities. Within my immediate family, there have been some experiences of the justice system; arrests and convictions but not imprisonment. However, I have been protected from these experiences — a reflection of being kiritea Māori/Samoan and now comfortably

middle class. The closest experience I have of law enforcement was during the police escalation of Protect Pūtiki, where I was called upon to care for my close friend following their brutal arrest and we both were taken across the Waitemata harbour on one of three police boats. This memory has haunted my perception of policing as indivisible from colonisation, stemming from an extensive history of state violence in suppressing Indigenous resistance.

Hugo Wagner-Hiliau
Tongan, Pākehā, he/him

I (Hugo) am a Tongan–Palagi hafakasi. My father Winston (born Salesi Uinisitoni) is from Kolofo'ou in Nuku'alofa. He moved to Aotearoa New Zealand, at age 12, with his older brother for their education. They lived with their Aunty Pui'i, who adopted them, in Sandringham–Morningside. My mother is Palagi and from Gisborne. They met in the 1980s at the University of Auckland. My upper–middle–class upbringing has, like Litia and Liz, afforded me the privilege of avoiding the justice system.

The most experience I have had with the police is being pulled over because my WOF had expired four months prior. Further, my mother is a Judge at the Manukau District Court, so in reality, I have more exposure to 'the other side'. Outside of what I have learned at law school about the justice system, most of my knowledge comes, like Litia's, from popular culture. Also, similarly to Liz, my knowledge of Tongan language, culture and custom is limited: my father taught me little, presumably because (a) of his experience of racism when he moved here; and (b) the sad but understandable mindset that it would be easier for my sister and me to succeed if we focused on gaining fluency in Pālagi culture and language. It is because of these privileges that I am proud to work alongside Litia and Liz on this project and give back as much as we can to our wider Pacific community.

Project Overview

This two-year research project (January 2021 to December 2022) is split into two written outputs. The first output (Report 1) analyses the extant literature on Pacific peoples and the justice system. The second output (Report 2) collates our Knowledge Holder responses from the talanoa (interview) and sets out possibilities for transformation.[15]

OVERARCHING AIMS OF THE RESEARCH

I was commissioned to undertake this research to address the increasing overrepresentation of Pacific peoples, especially Pacific men, across the negative indices of Aotearoa New Zealand's justice system. When writing the research proposal, I realised that the project must expand its terms of reference to bridge historical and contemporary timeframes, painting a fuller picture of the critical issues affecting Pacific peoples engaging with each stage of the justice system.[16] Given the project's size and scope, it explores multiple issues rather than any single topic in depth.

AIMS OF REPORT 1

This report analyses the extant literature relating to Pacific peoples and the justice system, identifying what exists, what is missing and what must be further explored. Our approach is multidisciplinary, adopting Moana Jackson's philosophy that criminal justice research must be holistically approached:[17]

Because the justice system does not exist in isolation from the society it serves, any study of its processes must include consideration of these questions. The influence of social, educational, and employment strategies upon the people who come into contact with justice processes, and the way in which the processes react to or maintain these structures are within the ambit of this study.

This report does not follow the structural conventions of a traditional literature review. Instead, it is ordered according to each stage of the justice system. This structure allowed us to explore the sub-issues relevant to each stage and identify discussion points for our talanoa with Knowledge-Holders.

AIMS OF THE SECOND REPORT

Central to this research is prioritising the lived experiences of our people who have interacted with the justice system, whether as offenders, survivors, family members or legal professionals (Knowledge Holders). Report Two will present our Knowledge Holders' responses to the research questions and consider how their perspectives can inform system-wide transformation.

RESEARCH QUESTIONS

The overarching research question is: what are the key systemic issues affecting Pacific peoples within the justice system, and how might these issues be overcome?

As an exploratory research project (and given the dearth of Pacific legal research in New Zealand), it was essential to keep the overarching question broad. In designing the research question, I was mindful of the need to locate Pacific legal research in conversation with the work already undertaken by Māori (discussed further below), and my interest in Indigenous discourses on criminal justice more broadly. Following this, the research team has identified four sub-questions. These may change during the research as new avenues of inquiry reveal themselves.

1. Is there a gap(s) between the cultural assumptions underlying the justice system and Pacific cultural values?

14 bell hooks *Teaching to Transgress: Education as the Practice of Freedom* (Routledge, New York, 1994) at 12.

15 We use "Knowledge-Holder" as opposed to "participant" to reflect the equal working partnership in the talanoa (interview) space.

16 It is important to clarify that, while Māori, as Polynesians, are also Pacific Islanders, this research focuses on the Pacific diaspora living in Aotearoa New Zealand whose ancestors began migrating here from the mid-20th century during the post-WWII economic boom. Given that Pacific peoples have settled in Aotearoa New Zealand for less than 100 years, the research team was able to trace their social, political, and criminological history beginning from the first wave of migration to today.

17 Jackson (1987), above n 1, at 10.

18 By 'Indigenous Pacific' we refer to the culturally and ethnic specific understandings of 'crime/criminality', 'justice' and 'punishment' communities had prior to the arrival of colonial missionaries to the Pacific islands.

This question explores the foundations of Aotearoa New Zealand's justice system and what values underpin our approach to crime, justice, and punishment. From there, we might consider what constitutes "Pacific cultural values", including, where possible, Indigenous Pacific perspectives on crime, justice, and punishment.[18]

2. Is "culture" really the key to reducing Pacific criminal offending?

A 2016 Radio New Zealand article inspired this question.
Headlined "Culture as key to cutting NZ's Pacific crime rate", it explored the role of Pacific liaison officers within the New Zealand Police force as the key to reducing the "high rate of Pacific offending."[19] We are interested in whether the inclusion of Pacific cultural norms, customs, rituals, teachings, methodologies, models and people into the justice system have had any tangible impact on reducing Pacific offending.

3. Is New Zealand making meaningful progress towards a more culturally inclusive justice system?

Noting the disproportionate presence of Māori and Pacific peoples across all negative indices of the justice system, what steps, if any, has the government actioned and/or proposed to create a transformative and equitable justice system?

4. Are there any identifiable groups within the Pacific community that are more negatively affected within the justice system?

Targeted legislative, policy and research interventions can be actioned by identifying which groups within our Pacific communities (across various identity intersections) are most underserved by the justice system.

A NOTE ON 'OVERREPRESENTATION'

Within the literature and mainstream news media, you will often hear discussion about Māori and Pacific peoples being "overrepresented" and/or "disproportionately represented" across all the negative indices of the justice system. Frequently, the intention of this framing is to highlight the system's glaring racial inequities and encourage urgent intervention.

Whilst the language of "overrepresentation" is helpful and statistically accurate, we take guidance from Moana Jackson, who said that "the notion of disproportionality is statistically, methodologically, and philosophically racist."[20] Although speaking vis-à-vis Māori and the justice system, Jackson argued that such a framing "privileges Pākehā as the norm against which we [Māori] must be measured."[21] To counter this, Jackson advanced an inquiry that interrogated the system itself:[22]

> I think it's actually more helpful, statistically, methodologically, philosophically, to just say "there are so many hundreds of Māori in prison, what does that tell us about prison? What does that tell us about the criminal justice system?"

Adopting this framework, we also ask; what do the high numbers of Pacific peoples being stopped, arrested, prosecuted, and incarcerated tell us about the justice system?

RESEARCH METHODOLOGY

As the lead researcher, I was tasked with creating the project proposal, setting the research agenda, liaising with relevant Knowledge Holders, structuring each report, and managing the research team. Research assistants were assigned weekly research tasks and wrote sections of both reports with editorial oversight. They also helped organise and record each talanoa. This report used a systematic literature review methodology to search, assess, and integrate the relevant literature from 1960 to 2022.

While most of the relevant literature was accessed online across various legal and social science databases, I also made a research trip to the National Library in February 2021 to retrieve hardcopy materials that were unavailable online.

19 Indira Moala "Culture as key to cutting NZ's Pacific crime rate" (12 April 2016) RNZ <www.rnz.co.nz>.
20 Moana Jackson, Sina-Brown Davis and Annette Sykes "Decarceration, Not Prison; Justness, not Justice; Constitutional Transformation, Not Treaty Settlements" (paper presented to Space, Race, Bodies II workshop, 6 May 2016) at 3.
21 At 3.
22 At 3.

Who are Pacific Peoples?

This question does not have a neatly packaged answer. It is better to disaggregate it into two separate but interrelated parts: who are we? Moreover, how did we find ourselves in Aotearoa New Zealand? As Melani Anae identifies:[23]

> There is no generic "Pacific community" but rather Pacific peoples who align themselves variously, and at different times, along ethnic, geographic, church, family, school, age/gender-based, youth/elders, island-born/NZ-born, occupational lines, or a mix of these.

'Pacific'/'Pasifika'/'Pasefika' peoples arev government-coined nomenclatures describing "people living in Aotearoa New Zealand who have migrated from the Pacific Islands, or who identify with the Pacific Islands because of ancestry or heritage."[24] "Pacific" is an umbrella term aggregating the various ethnic identities. However, "Pacific" is not a universally beloved term and is oft critiqued for collapsing multiple distinct identities into a racial monolith. As the authors of *Crafting Aotearoa: A Cultural History of Making in New Zealand and the Wider Moana Oceania* explain in their decision to use "Moana Oceania" as opposed to "Pacific":[25]

> The name "Pacific" was given to this region by a Portuguese navigator and explorer in 1521. Ferdinand Magellan's 'Mar Pacifico' — the peaceful sea — emphasises a narrow perception of the peoples and places of Moana Oceania as peaceful, tranquil, passive, which is not how Indigenous peoples from this region see themselves. Pacific has become Pasifika, Pasefika or Pasifiki, but these transliterations are derived from the same root. Moana means Ocean in the Māori language and in other island nations such as the Cook Islands, Hawai'i, Sāmoa and Tonga. While it can never be truly inclusive because of the diversity of languages and cultures of Moana Oceania peoples, it has meaning and relevance to this place … Oceania is another foreign name that was first used in the early nineteenth century. Today it is a popular alternative for Pacific because it suggests a sea of islands connected to each other, rather than isolated islands in a far sea. It is a name that is more meaningful to island nations that do not have the word moana in their languages. Together, Moana Oceania empowers and privileges Indigenous perspectives. It embodies a worldview that is strongly connected to Aotearoa but has its roots in the wider region.

When naming this project, I was aware of these tensions. However, I ultimately chose to use "Pacific Peoples" for its linguistic convenience and because of the multi-ethnic nature of this research. It is also used in law, policy, and statistics, thus expediting the research process. However, I do champion Hūfanga-He-Ako-Moe-Lotu Dr. 'Ōkus-

23 Melani Anae and others *Pasifika Education Research Guidelines: Report to the Ministry of Education* (Ministry of Education, December 2001) at 7.

24 Ruth Gorinski and Cath Fraser *Literature Review on the Effective Engagement of Pasifika Parents and Communities in Education* (Ministry of Education, January 2006) at 3.

25 Karl Chitham, Kolokesa Uafā Māhina-Tuai and Damian Skinner (eds) *Crafting Aotearoa: A Cultural History of Making in New Zealand and the Wider Moana Oceania* (Te Whanganui ā Tara (Wellington), Te Papa Press, 2019).

itino Māhina's view that there is a need for our communities to "collectively broker new ground by moving away from imposed terminologies for good and embracing our own Indigenous languages."[26]

Taimalieutu Kiwi Tamasese and others opine that culture defines who Pacific peoples are and that these shared cultural concepts are:[27]

> A. to serve
> B. [a] duty to care
> C. a requirement ... to sustain the community
> D. a cultural obligation or expectation [and]
> E. a form of love and reciprocity relating to kinship and protocols

As Pacific peoples, it is widely known that our gravitational centre is the family,[28] woven through intimate relations between peoples (past, present, and future), places, spaces, land, water, and time.

Emele Duituturanga writes that:[29]

> If individualism is the essence of mainstream culture, then "being part of a family: aiga, anau, magafoa, kaiga, kainga and kawa" is the essence of Pacific Islands cultures. Recognition of the fundamental differences would be a step in the right direction.

Demographic Overview

According to the 2018 census, we make up eight per cent of Aotearoa New Zealand's total population.[30] There are more than 40 Pacific ethnic groups in our community, each with their own language(s), intra-group specificities and cultural nuances. People identifying as Samoan comprise almost half of our community, followed by Tongan, Rarotongan and then Niuean, Fijian and Tokelauan.

Tuvalu, Kiribati, Papua New Guinea, Vanuatu, French Polynesia, Solomon Islands, and the Federated States of Micronesia account for a smaller portion of our population. Almost 10 per cent of our people identify with more than one Pacific ethnicity, and 32 per cent identify with ethnicities outside of "Pacific."[31] Notably, nine per cent of us identify as Pacific and Māori, with 44 per cent of those being children aged 0–14 years.[32]

26 Lagi Maama "Why Moana Oceania?" <www.lagi-maama.com>.
27 Taimalieutu Kiwi Tamasese and others *A Qualitative Study into Pacific Perspectives on Cultural Obligations and Volunteering: A Research Project Carried out by the Pacific Section and The Family Centre Social Policy Research Unit* (March 2010) at 9.
28 'Family' extends beyond the Western concepts of the immediate, nuclear family and includes extended and community relations.
29 Emele Duituturaga "Family Violence: A Pacific Perspective" in Anna Pasikale and Tai George *For the Family First: a study of income allocation within Pacific Islands families in New Zealand* (Destini, Wellington, 1995) at 73–74 as cited in Su'a Thomsen, Jez Tavita and Zsontell Levi-Teu *A Pacific Perspective on the Living Standards Framework and Wellbeing* (The Treasury, Discussion Paper 18/09, August 2018) at 8.
30 Statistics New Zealand "2018 Census population and dwelling counts" (23 September 2019) <wwww.stats.govt.nz>.
31 Ministry for Pacific Peoples *Pacific Aotearoa Status Report: A snapshot* (Ministry for Pacific Peoples, 2020) at 18.

Our population is young, fast-growing, urbanised and diverse, with just over 60 per cent being New Zealand-born.[33] Our median age is 23 years, 18.4 years younger than Pākehā.[34] Currently, 35 per cent of Pacific peoples are between 0-14 years, and by 2038, 11 per cent of the population will identify as Pacific.[35] It is important to read beyond these numbers as they are only a starting point for a broader analysis of how these demographics might impact our experiences of the justice system.

Our people experience poorer living standards across all socio-economic indicators compared to the national average. We have the lowest homeownership rates;[36] below-average employment rates and median incomes;[37] lower life expectancies;[38] and well above-average food-insecurity rates for children.[39]

As Karlo Mila writes:[40]

> Pacific peoples are an almost "textbook" example of an ethnic minority experiencing significant and enduring income inequality: indeed, a Pacific person living in New Zealand is 2.6 times more likely than the average person to be living in hardship.

The enduring socio-economic disenfranchisement our communities experience also informs how we relate to and engage with the justice system.

Situating Aotearoa New Zealand Within the 'Pacific'

> It is a strange fact that New Zealand can be literally all at sea in the Pacific Ocean, and yet pay that ocean, and neighbours and relations within it, so little attention.
> — Damon Salesa[41]

Finding ourselves on new islands has been woven into our navigational histories since time immemorial. Thousands of years ago, Māori sailed from Hawaiki and settled in Aotearoa.[42] Māori are also Pacific islanders, sharing an ancient, pre-colonial kinship with their whanaunga living in the islands a little further north. As Moana Jackson observes:[43]

32 At 29–30.
33 At 14.
34 At 21.
35 "Pacifica could make up 11 percent of the population by 2038" (30 September 2015) Radio New Zealand <www.rnz.co.nz>.
36 Statistics New Zealand *2013 Quick Stats About Housing* (March 2014) at 14.
37 Health Quality & Safety Commission *Bula Sautu — A window on quality 2021: Pacific health in the year of COVID-19* (July 2021) at 23.
38 At 26.
39 Ministry of Health *Household Food Insecurity Among Children: New Zealand Health Survey* (June 2019) at 15.
40 Karlo Mila "Only One Deck" in Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (Bridget Williams Books, Wellington, 2013) 91 at 99 (footnotes omitted).
41 Damon Salesa "Native seas and native seaways: The Pacific Ocean and New Zealand" in Frances Steel (ed) *New Zealand and the Sea* (Bridget Williams Books, Wellington, 2018) 50 at 50 as cited in Lana Lopesi "Where in the World? Placing New Zealand in the Pacific" *Bulletin Magazine* (online ed, Christchurch, 1 June 2020).
42 See Atholl Anderson, Judith Binney and Aroha Harris *Tangata Whenua: A History* (Bridget Williams Books, Wellington, 2015).

> The tipuna never forgot that, as much as whakapapa tied us to this land, it also tied us to the Pacific Ocean that we call Te Moana-nui-a-Kiwa. When Māui dragged the land from the sea, these Islands were known as "te tiritiri o te Moana", the gift from the sea, and so they have remained. … [W]e never lost sight of the fact that we were still standing on Pacific Islands and that the relationships in such a place would always be mediated through a palpable sense of intimate distance.

By contrast, New Zealand (the 182-year-old settler-colonising state) has a shorter but no less complex relationship with its Pacific Island neighbours. By annexing these lands, Britain strategically leveraged its imperial dominance throughout the region, and the newly formed New Zealand colony became the gateway to Te Moana-Nui-a-Kiwa. From the 1870s, New Zealand's colonial administration repeatedly and successfully campaigned to Britain for the annexation of Sāmoa (1920–1962), Rarotonga (1901–1965), Niue (1901–1974) and Tokelau (1926–present) to establish regional economic hegemony.

As the Matada Research Group writes, "the New Zealand government represented itself as capable of taming and civilising what it positioned as the unruly and uncivilised Pacific population."[44] Prime Minister Richard Seddon spoke to New Zealand's "Pacific Destiny" as the inevitable expansion of Crown sovereignty, from the colonisation of tangata whenua to the colonisation of Tangata o le Moana: "We can take our own Natives and gauge the Polynesians of these islands by them."[45]

New Zealand's 'Pacific Destiny' represents the violent distortion of cosmologies — a severing of this whenua from its whakapapa to Te Moana-Nui-a-Kiwa at the ascendancy of Western cartographies and White imperial authority.

As Teresia Teaiwa wrote:[46]

> The New Zealand Government could extend its colonial reach into the Pacific during the early twentieth century precisely because it saw itself as a British agent rather than a Pacific Island.

Scholars cite New Zealand's complicity with the South Pacific slave trade (blackbirding),[47] its gross mishandling of the 1918 influenza pandemic when sick passengers from a New Zealand ship disembarked in Samoa infecting and killing 25 per cent of the population,[48] the 1929 Black Saturday murders against the Mau resistance movement,[49] and its under-resourcing of Pacific education systems,[50] as several examples of the racist ideologies embedded in its colonial relations. Before publishing his poetically hopeful piece on oceanic regionalism in "Our Sea of Islands",[51] Epeli Hau'ofa wrote "The New South Pacific Society: Integration and Independence", a Marxist, anti-imperialist critique of regionalist economies.[52]

Hau'ofa spoke to the emergence of "The New South Pacific Society" in response to the post-World War II global push for decolonisation as legitimised by the United Nations. Contrary to the intentions of decolonisation, however, this new system of regionalism has reproduced the dynamics of former Empires, integrating "the Pacific Islands into the Australian/New Zealand economy and society to the extent that the islands cannot or will not disentangle themselves."[53] Hau'ofa argued that a transnational economic system has consumed South Pacific territories propelled and orchestrated by Western governments, commercial entities, and military organisations closely enforcing one another.[54] Australia and New Zealand (as settler states that have become sites for imperialist expansion) continue to hold a monopoly on industrial, financial, and trade-related services within the Pacific islands. Moreover, regional development maintains Pacific states' dependency on Australian and New Zealand foreign aid.

Diasporic narratives focus on Pacific migration towards settler colonies without recognising how this dynamic operates in reverse through the integration of Australian and New Zealand officials within South Pacific bureaucracies. As a result, the creation of neo-imperialist societies within South Pacific states lends itself to the extension and entrenchment of Western capitalist class structures. Socioeconomic inequity within New Zealand and Australia becomes mirrored throughout the South Pacific region. Most violently, the "discovery" of resources in Papua New Guinea and Kiribati (among others) dislocates these terrains into the exploitation of transnational mining corporations, feeding the Western economy through new manifestations of Empire.

Pākehā are notoriously ambivalent about their relationship with Te Moana-Nui-a-Kiwa and the Pacific diaspora in New Zealand. As historian Kerry Howe argues:[55]

> Pakeha New Zealanders never regarded themselves as "Islanders" or as of the region, but as members of a self-constructed, advanced nation-state whose origins and subsequent external interests lay well beyond the Pacific Ocean.

This reflects New Zealand's paternalistic (and arguably, parasitic) relationship with its Pacific Island whanaunga, built from a legacy of colonial occupation and capitalist exploitation of the islands' lands, resources, and people in advancing its settler-colonial vision. Lana Lopesi writes:[56]

43 Moana Jackson "Where to next? Decolonisation and the stories in the land" in Rebecca Kiddle (ed) *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) 133 at 137–138.

44 Matada Research Group *Pacific Pay Gap Inquiry Literature Review* (Human Rights Commission, 2022) at 8, citing Marcia Leenen-Young and Sereana Naepi "Gathering Pandanus Leaves: Colonization, Internationalization and the Pacific." (2021) 11 Journal of International Students 15.

45 Damon Salesa "New Zealand's Pacific" in Giselle Byrnes (ed) *The New Oxford History of New Zealand* (Oxford University Press, New Zealand, 2009) 149–172.

46 Teresia Teaiwa "Good neighbour, big brother, kin?: New Zealand's foreign policy in the contemporary Pacific" in Sean Mallon, Damon Salesa, Kolokesa Māhina-Tuai (eds) *Tangata o le moana: New Zealand and the people of the Pacific* (Te Papa Press, Wellington, 2012) at 241.

47 Scott Hamilton *The Stolen Island: Searching for 'Ata* (Bridget Williams Books, Wellington, 2016) at 40–43.

48 Jamie Tahana "How NZ Took Influenza to Samoa, killing a fifth of its population" (7 November 2018) RNZ <www.rnz.co.nz>.

49 Ministry for Culture and Heritage "New Zealand in Samoa" (updated 30 April 2020) New Zealand History <https://nzhistory.govt.nz>.

50 Leenen-Young and Naepi, above n 45, at 18–22.

51 Epeli Hau'ofa "Our Sea of Islands" in Paul D'Arcy (ed) *Peoples of the Pacific: The History of Oceania to 1870* (Routledge, London, 2008).

52 Epeli Hau'ofa *We Are the Ocean: Selected Works* (University of Hawai'i Press, Hawai'i, 2008) at 11–24.

53 At 11.

54 At 11.

55 KR Howe "Two Worlds?" (2003) 37 New Zealand Journal of History 50 at 50 (emphasis omitted).

> Aotearoa, a series of islands at the edge of Te-Moana-Nui-a-Kiwa or the Pacific Ocean, has a long and layered relationship with the Pacific. As historian Mary Boyd points out, it's taken New Zealand a long time "to make up its mind that it was a Pacific country and not a European outpost," because as scholar Alice Te Punga Somerville reminds us, New Zealand itself once *was* Pacific. However, longstanding connections between Māori and their non-Māori Pacific cousins has—since the 1800s-been mediated by Pākehā and the western worldview which New Zealand society is built on. And so today within Aotearoa, when we talk about the Pacific, we do not talk about the Pacific of which New Zealand is a part of but rather the microcosm of Pacific people inside New Zealand with long (and short) histories unique to this place. For these Pacific people, their New Zealand experience has almost always had a strong relationship to labour and to work.

The second wave of Pacific migration took place some 150 years ago, with various Pacific peoples arriving in New Zealand as "trainee teachers, missionaries, sailors and whalers."[57] The third wave occurred in the late 19th century when Pacific peoples who served in the colonial governments were permitted to relocate to New Zealand.[58] The fourth wave of migration following World War II is arguably our most significant.[59]

Post 1945, New Zealand marketed itself throughout the Pacific as a utopic "land of milk and honey" ripe with (economic) opportunity. As Natsu Taylor Saito contends, the motivations for migrants of colour moving into settler colonies are largely aspirational as "[they] undoubtedly came voluntarily, believing—however naïvely—in their ability to share in the benefits accrued by the largely Eurodescendant settler class."[60] However, we must be careful not to suggest that we were all naïvely coaxed into migrating to these shores.

As Mae Ngai contends:[61]

> [G]lobal migration is not simply "a unidirectional phenomenon, in which the hapless poor of the world clamor at the gates of … wealthier nations" … . Rather, our demographic history is "the product of specific economic, colonial, political, military and/or ideological ties."

Many of our people migrated to New Zealand in the early 1950s mainly in pursuit of economic opportunity. The post-World War II economic boom created a surplus in the manufacturing labour pool, and immigration restrictions were relaxed to accommodate the influx of our people sent to fulfil these critical labour shortages.

56 Lana Lopesi "When Worlds Collide: Pacific Ideas of Success in New Zealand's Workforce" *Flint & Steel* (online ed, Auckland, 2020).
57 Matada Research Group, above n 45, at 5.
58 Sereana Elina Patterson "Beyond the Dusky Maiden: Pasifika Women's Experiences Working in Higher Education" (PhD Dissertation, University of British Columbia, 2018) as cited in Matada Research Group, above n 45, at 6.
59 Matada Research Group, above n 45 at 6.
60 Natsu Taylor Saito *Settler Colonialism, Race, and the Law: Why Structural Racism Persists* (New York University Press, New York, 2020) at 112.
61 At 112 (footnotes omitted).
62 David Pearson A Dream Deferred: The Origins of Ethnic Conflict in New Zealand (Allen & Unwin, Wellington, 1990) at 117.

In 1945, there were only 2,159 of us in New Zealand, but within two decades, that number rose to 26,271.[62] In this way, the first generation of Pacific migrants could be described as "time travellers", literally and figuratively crossing the oceanic time-space to create opportunities for their future relations.[63] However, upon touching these shores, many families were immediately thrust into economic hardship, housing deprivation, poor education, and unable to access social services. By the early 1970s, the economy had nosedived, impacted by the United Kingdom's shift into the European Economic Community and increased crude oil prices. As Mila argues, "[t]wo of the responses to the economic downturn — the loss of jobs and the competition for scarce resources — were to "racialise" workers from the Pacific."[64] Pacific overstayers became the scapegoat for New Zealand's socio-economic ills despite 80 per cent of overstayers being from the United Kingdom, the United States and South Africa.[65]

The tightening of immigration laws coupled with the targeted policing of our community culminated in the infamous dawn raids, which are described as "the most blatantly racist attack on Pacific peoples by the New Zealand government in New Zealand's history."[66] In the 1970s, we were more likely to be participating in the labour market compared to the total population, but by the mid-1980s, we were more likely to be unemployed.[67] By the 1980s, neoliberal economic reforms coupled with the mass restructuring of the manufacturing sector resulted in another economic battering and within a decade, our unemployment rate rose from six to 28 per cent.[68] It was as obvious then as it is now that our precarious socio-economic status would be difficult, if not impossible, to salvage without radical political intervention.[69]

Mila argues that we were:[70]

> "Last on, first off [the raft]", with the fewest transferable skills, Pacific peoples were a disposable and politically expedient labour force now surplus to the requirements of a shrinking job market.

We still have higher rates of unemployment when compared to the total population and remain concentrated in unskilled or semi-skilled labour.[71] The prevalence of socio-economic disadvantage is an enduring feature of the Pacific diasporic experience. Notwithstanding the terror of the dawn raids and net migration losses in the 1990s, our population has continued to grow.

Based on current population projections, it is estimated that by 2026 we will comprise at least ten per cent of the total population.[72]

63 The idea of immigrant parents as Cath Park Hong inspired time travellers. See Cathy Park Hong *Minor Feelings: An Asian American Reckoning* (One World, New York, 2020) at 67.
64 Mila, above n 41, at 96.
65 Paul Spoonley *Racism and Ethnicity: Critical Issues in New Zealand Society* (Oxford University Press, Oxford, 1988) at 4.
66 Melani Anae *The Platform: The Radical Legacy of the Polynesian Panthers* (Bridget Williams Books, Wellington, 2020) at 90.
67 Cybèle Locke "Ngā uniana – Māori and the union movement – Recession: 1970s–1990s" (11 March 2010) Te Ara: the Encyclopaedia of New Zealand <https://teara.govt.nz>.
68 Mila, above n 41, at 96, citing Patrick Ongley "Immigration, Employment and Ethnic Relations" in Paul Spoonley, Cluny Macpherson, and David Pearson (eds) *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 1996).
69 Ministry of Social Development *The Social Report: Te pūrongo Oranga Tangata* (2005).

Relationship to Tangata Whenua

Tangata Whenua and Tagata Pasifika share a long and layered history both within and outside of Aotearoa predating colonial contact and the signing of Te Tiriti. However, romanticising our relationship as one happy brown whānau overlooks the complex and sometimes "ambivalent kinships"[73] existing between us. As Mila writes:[74]

> The wealth and industry critical to New Zealand's prosperity were not once in our [Pacific Islanders'] hands. Nor has legislation developed by the settler colony sought to dispossess us further, minimised our opportunities, treated us differently or, for the most part, stripped us of our sovereignty. We are positioned very differently to Māori in this respect: … that is, we are non-indigenous settlers on this land.

Foremost, our most significant migration wave was by invitation from the state, not tangata whenua.

Thus, our (re)connection with Māori was, and still is, primarily mediated through the settler-colonial paradigm.[75] Issues of resource allocation and political prioritisation have long been a flashpoint for Māori and Pacific relations, primarily negotiated by the bicultural/multicultural political discourse.

In 1987, Ranganui Walker observed that "the ideology of multiculturalism is resorted to a mask for Pākehā hegemony and to maintain the monocultural dominance in New Zealand."[76] Furthermore, Seta Hao'uli argues that the early Pacific migrants were "uninterested in Māori issues because they were not relevant to their day-to-day life"[77] and that aligning with the Tino Rangatiratanga and Mana Motuhake movements would potentially threaten our relationship with Pākehā whom many consider the benevolent "hand that feeds [us]."[78] Donna Awatere provides one of the strongest critiques of this "ambivalent kinship", opining that we have the "greatest potential to be an ally for Māori" albeit failing to fully realise that responsibility:[79]

> The difficulty with Polynesians is not that they are white, but that white culture in the form of Christianity, and its sidekick aggressive materialism has so impacted on their culture. They are ravaged by a desperate need to 'get' a white education, material goodies and white status. In the short term it means that the Pacific Island people are not at this moment prepared to ally themselves with us. But this could change in the long term. All this white education, goodies and status have a high cultural cost, which future generations will have to pay. Perhaps then we can look again.

Although we are the natural, pre-colonial allies to Māori, Awatere posits that we often lack a nuanced understanding of the Indigenous political reality — sometimes looking at Māori "with pity and occasionally contempt for whose sovereignty had been taken."[80] Awatere contends that our understanding of Mana Motuhake and Tino Rangatiratanga is poor, with multiculturalism offering a more palatable pathway to assimilate into the settler-colonial regime. Awatere argues that multiculturalism is a deliberate divide-and-conquer tactic deployed by the state designed to entice us away from forming political alliances with Māori:[81]

> However, the "multiculturalism" offered to Pacific peoples is not a decision-making power, it is another lizard's trick, a continuation of white power dressed up in tapa cloth. True multiculturalism would mean that Pacific Island people must be part of the economic, political, and philosophical policy making systems. This will *never* occur under white sovereignty. *Nor should it*. It is not for guests to make deals with each other on carving up the tangata whenua's home. It is up to *Maori* to offer "culturalism", whether "bi" or "multi-" to the Pakeha and to the Polynesian … peoples.

In challenging pseudo-constructions of multiculturalism by the New Zealand settler-colonial state, Samoan legal scholar Dylan Asafo's article "Freedom Dreaming of Abolition in Aotearoa New Zealand: A Pacific Perspective on Tiriti-based Abolition Constitutionalism" lays the papa for a reimagining of Tangata Moana–Tangata Whenua intimacies and solidarities through the honouring of Te Tiriti o Waitangi; the abolition of settler colonialism and carceral violence.[82]

> Asafo speaks to Tangata Moana as a constitutional relationship distinct from Tangata Tiriti, acknowledging the whakapapa of Aotearoa within Te Moana-nui-a-Kiwa. This framing stems from Te Pāti Māori's proposition of an Aotearoa Hou, where "Tangata Whenua, Tangata Moana and Tangata Tiriti together will realise the true intent of Te Tiriti o Waitangi."[83]

This echoes Moana Jackson's words, who describes the severing of our whakapapa relations as one of settler-colonialism's most successful campaigns:[84]

70 Mila, above n 41, at 96.
71 Ministry of Business, Innovation and Employment *Pacific Peoples in the Labour Market – December 2020 Quarter (unadjusted)* (2020).
72 Mila, above n 41, at 91.
73 Teresia Teaiwa and Sean Mallon "Ambivalent Kinships? Pacific People in New Zealand" in James H Liu and others (eds) *New Zealand Identities: Departures and Destinations* (Victoria University Press, Wellington, 2005) 401; and Tracie Mafile'o and Wheturangi Walsh-Tapiata "Māori and Pasifika Indigenous Connections: Tensions and Possibilities" (2007) 3(Special Supplement) AlterNative 129.
74 Mila, above n 41, at 92.
75 This point about whether Tauiwi of Colour are 'settlers' is contentious. However, we suggest that although Pasifika were never engaged as settlers in the traditional sense, they still engage(d) in a form of settlement process that aids in the dispossession of Tangata Whenua from their land.
76 Ranganui Walker *Nga Tau Tohetohe: Years of Anger* (Penguin, Auckland, 1987) at 124.
77 Tracey McIntosh "Hibiscus in the Flax Bush: The Maori-Pacific Island Interface" in Cluny Macpherson, Paul Spoonley and Melani Anae (eds) *Tangata O Te Moana Nui: The Evolving Identities of Pacific Peoples in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 2001) 141 at 150.
78 Toon Van Meijl "Maori-Pasifika relations: A problematic paradox?" (2014) 2 Journal of New Zealand & Pacific Studies 157 at 164.
79 Donna Awatere *Maori Sovereignty* (Broadsheet, Auckland, 1984) at 14.
80 At 35.
81 Donna Awatere "Maori Sovereignty: part two – Alliances with Pacific Island People, White Women, the Trade Union Movement, and the Left" *Broadsheet* (Auckland, October 1982) at 26 (emphasis from original).
82 Dylan Asafo "Freedom Dreaming of Abolition in Aotearoa New Zealand: A Pacific Perspective on Tiriti-based Abolition Constitutionalism" (2022) 2 Legalities 82.

> One of the worst things that colonisation did to our people [Māori] was make us forget that we are Pacific peoples. So, for generations "Pacific Islanders" did not include Māori, "Pacific Islanders" were those people over there … and so that created division where history and whakapapa had once bound us together …

These ancestral ecologies — or the intimate distance between Māori and their Moana whanaunga — expand before the signing of Te Tiriti with the British Crown. Critical examples of Māori and Pacific solidary are evident throughout history in Māori support of the Mau movement for Samoan independence, the activism of the Polynesian Panthers and Ngā Tamatoa, the Black Women's liberation movement, Pacific support to protect Ihumātao, and several climate justice campaigns.[85]

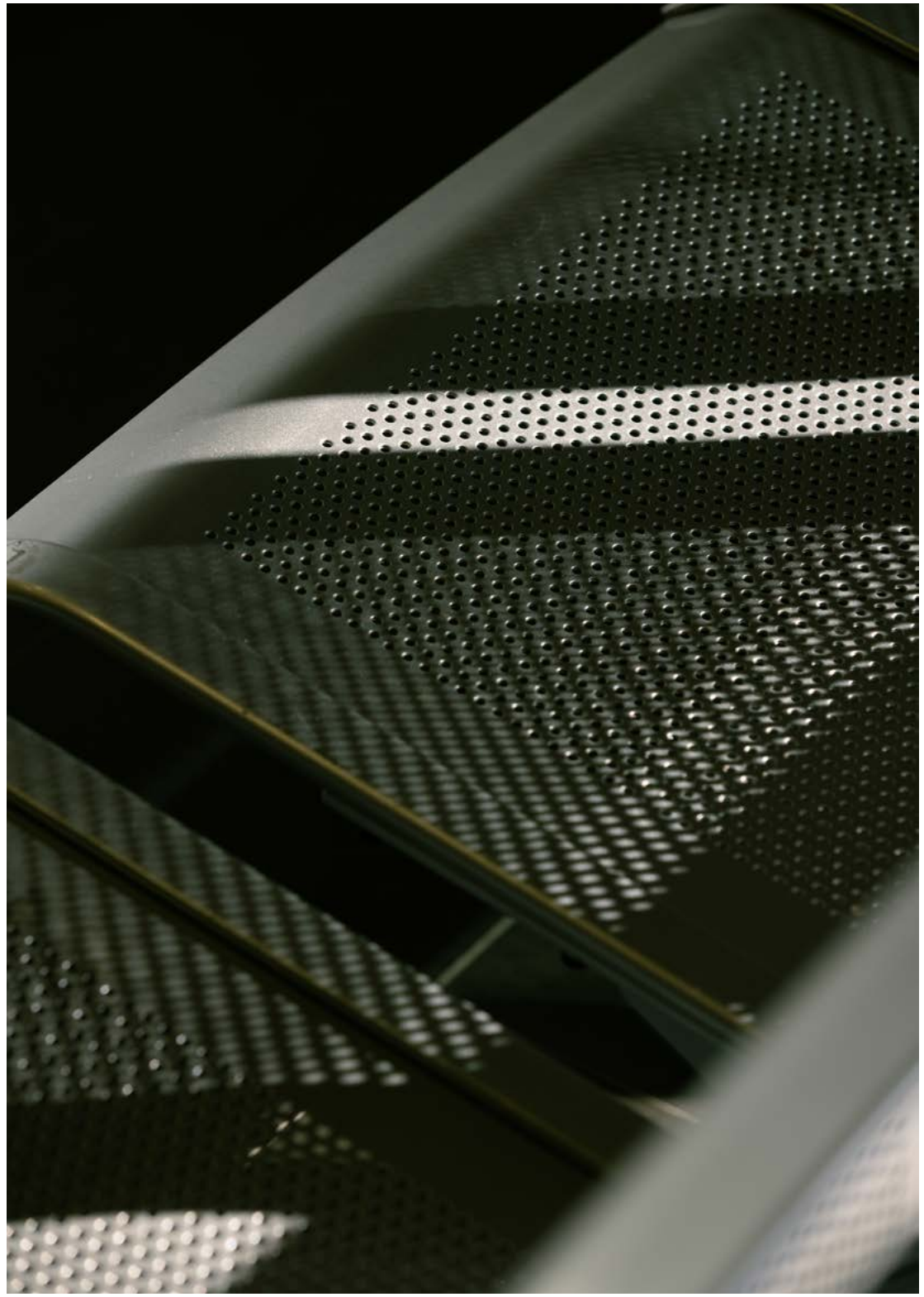
However, Tangata Moana's positioning within constitutional futures should never lend itself to the co-option of Tino Rangatiratanga Māori, and we have similar obligations as Tangata Tiriti in this respect. Rather, through the remembrance of whakapapa, Pacific communities must realign and reimagine our relationship with Aotearoa beyond the settler-colonial state ('New Zealand') as an expression of solidarity with Tangata Whenua first and foremost.

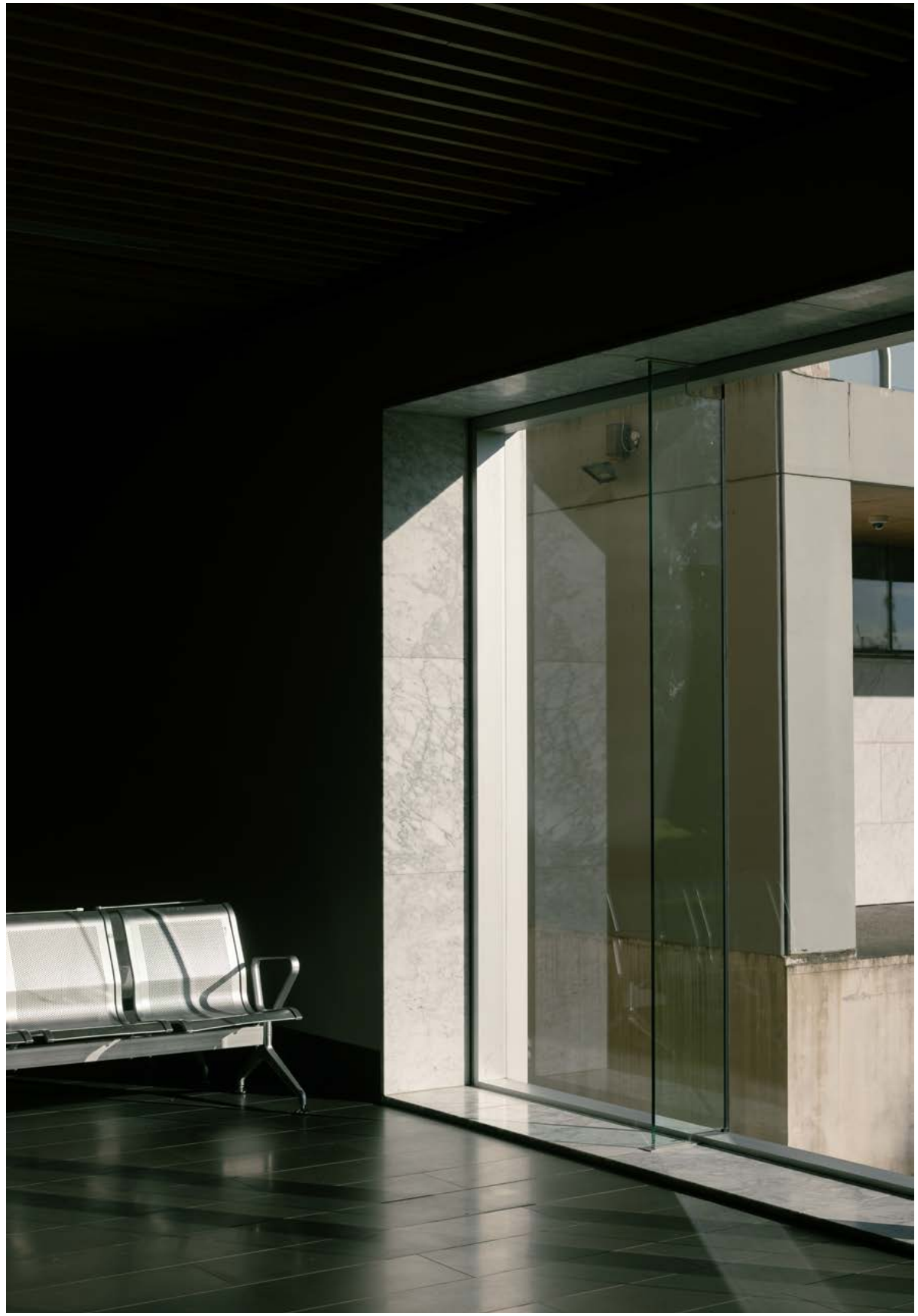
An understanding of how the colonisation of Aotearoa is situated within the expansion of Empire throughout the Pacific helps underscore the necessity of Māori self-determination in the collective liberation of Te Moana-nui-a-Kiwa. As Alice Te Punga Somerville argues:[86]

> As long as Māori and Pasifika communities insist that their primary relationship is with the New Zealand nation-state, relationships between these communities will struggle to function beyond the narrow parameters that the state provides.

These are essential, urgent, and challenging points, especially concerning our relationship with the justice system. In our view, honouring the words of Te Tiriti is a core responsibility of this research, and we hope to expand on this discussion in Report Two.

83 Te Pāti Māori <www.maoriparty.org.nz>.
84 Te Tiriti Based Futures & Anti Racism "A kōrero with Moana Jackson" (5 April 2020) Youtube <www.youtube.com>.
85 See Melani Anae "The Treaty of Waitangi and the vā Between Māori and Pacific peoples in Aotearoa, New Zealand" (4 February 2021) PMN <https://pacificmedianetwork.com>.
86 Alice Te Punga Somerville *Once Were Pacific: Māori Connections to Oceania* (University of Minnesota Press, Minnesota, 2012) at 175.



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Understanding Pacific Peoples and the Justice System

Where are Pacific Peoples Within the Justice System?

A snapshot of the justice system reflects that we are overrepresented as criminal offenders, within prisons and as youth offenders. We also have a disproportionately higher rate of police apprehensions relative to our population size.[87] In 2021, we accounted for 8.1 per cent of all police proceedings,[88] and nine per cent of sentences.[89] As of 30 June 2020, we comprise 11.9 per cent of the prison population, with 97.7 per cent of those identifying as Pacific men.[90] We are more likely to be sentenced to a custodial sentence than non-Pacific peoples and are less likely to receive home detention, community work or a fine than non-Pacific peoples (excluding Māori). Our men (predominantly Samoan and Tongan) comprise the majority of our offending statistics and are more likely to cause harm for violent offending than Pacific women. Our youth offending rates have been a critical justice issue for over a decade. As a youthful population, our offending rates for those under 18 are dominant.

Our youth are overrepresented in offending statistics making up 21 per cent of all police proceedings.[91] Of our youth entering the justice system for violent offending, 16 per cent are our young women.[92] Samoan clinical psychologist and academic Julia Ioane has written extensively on Pacific youth offending, and her scholarly contributions have informed more culturally responsive approaches to youth justice policy and practice.[93] For this research, our focus is on Pacific peoples over 18 years, given the substantive work already undertaken on youth offenders and survivors.[94] The following sections will discuss the literature on our people who have caused harm, their most common types of offending, and our survivors of criminal offending.

Pacific Offenders

Our offending population is marginally overrepresented, proportionate to our total population size, in criminal proceedings. The most dominant offences are road violations and low-level assaults, with the majority of our offending population being men under 25.[95] However, police data from 2014 to 2022 shows a steady decline in the total proceedings against us by almost half.[96] The reasons for this decrease are not cited in official police data, and we cannot comment on the factors contributing to this downward trend.

87 Statistics New Zealand "Annual Apprehensions for the latest Calendar Years" <https://nzdotstat.stats.govt.nz>. The data gathered is from 1994 to 2014.
88 New Zealand Police "Proceedings (offender demographics)" <www.police.govt.nz>.
89 Stats NZ, 2021.
90 Department of Corrections *Corrections Volumes Report 2019–2020* (2020) at 121. Out of 3,409 remand offenders, 407 identify as Pacific. Out of 407 Pacific remand offenders, 398 identify as male.
91 Charlotte Best, Julia Ioane and Ian Lambie "Young female offenders and the New Zealand Youth Justice system: the need for a gender-specific response" (2021) 28 Psychiatry, Psychology and Law 867 at 868.
92 Julia Ioane and Ian Lambie "Pacific youth and violent offending in Aotearoa New Zealand" (2016) 45 New Zealand Journal of Psychology 23 at 25.
93 See Julia Ioane "Talanoa with Pasifika youth and their families" (2017) 46 New Zealand Journal of Psychology 38.
94 We extend our gratitude to the research undertaken by Dr Julia Ioane and Dr Tamasailau Suaalii Sauni.
95 Department of Corrections *Topic Series: Pacific Offenders* (April 2015) at 5; and Pasefika Proud *The profile of Pacific peoples in New Zealand* (September 2016) at 20.
96 New Zealand Police "Proceedings (police stations)" <www.police.govt.nz>.

LOCATION OF OUR OFFENDING

Most police proceedings against us is in Tāmaki Makaurau with a concentration in Counties Manukau followed by Auckland City and Waitematā. This reflects our demographic spread in Tāmaki Makaurau, where 66 per cent of us reside in Manukau city. Less than 10 per cent of proceedings are in the Wellington area with no more than five per cent in any other police district.

AGE AND GENDER OF OFFENDERS

Between 2012 to 2017, 43 per cent of our criminal proceedings were for those aged 15–24 and thirteen per cent of proceedings were against those aged 24–29. Those aged 30–49 comprised roughly 23 per cent of the Pacific population in that period but accounted for 31 per cent of all proceedings. Only 6 per cent of proceedings were tried against those 50 years plus, with that age group accounting for roughly 14 per cent of our population. A 2015 report from the Department of Corrections found that our offenders tend to be younger than non-Pacific offenders.[97] Approximately 82 per cent of proceedings were against Pacific men, with our women less likely to be prosecuted than the general female population.

MAIN OFFENCE TYPES

We predominantly present in the following offence types: road violations; violent offences (such as assault and robbery); certain theft offences; sexual offences; disorderly conduct; and breaching bail.[98]

1. Road Violations

   From 2014 to 2022, of all the police charges laid against us (77,413), traffic and vehicle regulatory offences accounted for 31 per cent of offences that proceeded to court action — more than any other crime type per annum. Even when accounting for the 33 per cent decrease in the number of proceedings for road violations between 2012 to 2017, this was still our highest offence category, comprising more than a quarter of all proceedings, with 60 per cent of these being for licence-related offences. In 2017, we accounted for 19 per cent of all proceedings for "Driving without a licence" and 11 per cent of proceedings for "Driving while disqualified" (down from 27 per cent and 13 per cent respectively in 2012, but still disproportionately high compared to our total population size). In the "Regulatory Driving Offences" category, we are overrepresented in drunk driving offences and lack of child restraint use in a motor vehicle.

2. Violent Offences

   Between 2014 and 2022, violent offences (excluding homicide and sexual off-ending) represented 18.5 per cent of all charges that proceeded to court action. Again, the number of violent assault proceedings against us decreased by 30 per cent between 2012 and 2017.

   The most significant decrease in the "Assault" subcategory was in proceedings for "Common Assault", which fell 49 per cent. However, proceedings for the "Serious Assaults Resulting in Injury" subcategory rose by 13 per cent, suggesting that while assaults have decreased overall, the proportion of more serious assaults has increased. Between 2012 and 2017, the percentage of assault proceedings fell marginally from 13 per cent to 12 per cent.

   Many of these proceedings were against our young people, with 43 percent aged 25 or under. For robberies committed between 2012-2017, the number of proceedings against us increased by 17 per cent. Proceedings for "Aggravated Robberies" (involving more than one person, or with a weapon, or where a victim is grievously injured)[99] increased by 22 per cent. The police data suggests that we are twice as likely as the general population to be proceeded against for a robbery offence.

3. Burglary and Theft

   We are equally likely as the general population to be prosecuted for burglary or theft. In 2017, we made up 8 per cent of all burglary proceedings, and we were 7.2 per cent of all theft proceedings. Both percentages were comparable to our population size. Further, from 2012 to 2017 the number of proceedings against us for burglary and theft fell from 49 per cent and 43 per cent respectively. However, we are still overrepresented in motor vehicle thefts, particularly for offenders aged 25 and under. We are also considerably overrepresented in the "Theft from a person" subcategory being seventeen per cent of total proceedings in 2017, an increase from 14 per cent in 2012.

4. Sexual Offences

   Between 2012-2017, the number of proceedings against us for "Sexual assault and related offences" was 19 per cent, and proceedings for "Sexual assaults of an aggravated nature" sat at 32 per cent. In sum, we are slightly overrepresented for this offence type. There is scant research about Pacific people and sexual offending, especially when that offending is against others in our community (i.e., within the family or close acquaintances).[100] In 2008, then Justice Minister Annette King launched the Amanaki Pasifika Sexual Offending Programme aimed at reducing sexual offending by taking into account language barriers, religion, and cultural differences.[101] We could not find any research about the programme beyond the government press release.

5. Drug Offences

   Since 2012, the number of us charged and convicted for drug-related offences has sat between 6 to 8 per cent.[102] The data indicates that we are not

97 Department of Corrections, above n 96, at 3.
98 New Zealand Police, above n 97. All following data is sourced from here.
99 Crimes Act 1961, s 235.
100 See Teuila Percival and others *Pacific pathways to the prevention of sexual violence: Full report* (Ministry of Pacific Island Affairs, October 2010).
101 Annette King "Amanaki Pasifika Sexual Offending Programme launched" (press release, 12 April 2008).

disproportionately charged or convicted for drug offences when measured against our total population size.

6. Serious Offences[103]
   An offence is defined as serious if it is imprisonable and carries a maximum sentence length of seven years or more. This includes offences such as murder, aggravated robbery, rape and the supply, administration and dealing of methamphetamine and amphetamines. Between 2012 and 2021, we have consistently been nine to ten per cent of those charged with serious offending. By comparison, Māori rates of serious offending have steadily increased from 46 per cent (2012) to 51 per cent (2021). For Pacific peoples, the percentage of charges mirrors the conviction rates for the offences mentioned above (with a one per cent variance across different years).

This suggests that almost all Pacific peoples charged with a serious offence will receive a conviction and sentence.

Explanations For Offending

Few qualitative studies explore Pacific criminality in Aotearoa New Zealand. Individuals across all ethnic groups will offend for any number of reasons. No particular causative explanation exists for why we offend more than others. While we can readily dismiss the pseudo-scientific theories that we are genetically more predisposed to criminal behaviour, research on racial disparities in the justice system tend to revolve around two explanations: disparate impact and differential treatment.[104]

The former contends that the overrepresentation of Pacific peoples presenting in the justice system can be attributed to racialised capitalism, socio-economic and educational disenfranchisement, and being more susceptible to the sanctions of facially 'neutral' laws and practices. Differential treatment explanations contend that racial disparities in the justice system arise from overt or implicitly discriminatory treatment of Pacific peoples by criminal justice agents, including police, prosecutors, judges, parole boards and probation officers. Importantly, these explanations are not mutually exclusive. Furthermore, if most criminal offending goes unreported, examining who is *not* charged (and why) is just as important as considering who is.

102 Ministry of Justice "Data tables: Specific offence types – Drug Offences" (20 September 2022) Research & Data <www.justice.govt.nz>. The data is taken from 1 July 2012 to 30 June 2022.
103 Ministry of Justice "Data table: Specific offence types – Serious offences" (20 September 2022) Research & Data <www.justice.govt.nz>. The data is taken from 1 July 2012 to 30 June 2022.
104 See Robert J Sampson and Janet L Lauritsen "Racial and Ethnic Disparities in Crime and Criminal Justice in the United States" (1997) 21 Crime and Justice 311; Michael Tonry *Malign Neglect: Race, Crime, and Punishment in America* (Oxford University Press, New York, 1995); and Katherine Beckett, Kris Nyrop, and Lori Pfingst "Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests" (2006) 44 Criminology 105.
105 Andrew Trlin "Immigrants and Crime: Some Preliminary Observations" (1968) as cited in "Crime in a Multiracial Society" (Criminology Seminar, Victoria University of Wellington, 1972) at 11.
106 At 13.
107 We assume this is because fewer people owned vehicles.

Historical Analyses of Pacific Criminality

The formative explanations for Pacific criminality were levelled by Pākehā scholars in the 1960s–1970s following our fourth migration wave. In 1968, Andrew Trlin made the following observations on immigrants and crime:[105]

Birthplace	Sexual Offences	Assault	Burglary, Theft & Fraud	Conversion & Wilful Damage	Vagrancy & Drunkenness
NZ Pākehā	0.43	0.5	5.38	1.08	5.4
Maori	1.58	3.79	25.5	8.11	16.0
West Samoa	2.44	13.13	7.26	6.08	31.7
Poland	0.25	2.29	5.37	2.46	22.4
Scotland	0.28	0.84	3.51	1.12	15.8
England	0.31	0.68	3.67	1.33	7.6
Yugoslavia	0.12	1.05	2.38	0.49	2.7
China	0.15	0.32	0.67	0.13	0.96

The association of immigrants with excessive criminality has a long tradition in New Zealand. At present the Pacific Islanders hold the limelight on charges of drunken brawling and assault. Fijians who overstay their visitors' permits and are prosecuted under the Immigration Act have also become somewhat notorious, according to the Evening Post of 7 September 1967.

Trlin's analysis of the convictions per 1000 males 15 years and over from 1961–1963 is documented in the above table:[106]

Comparing the above data table with contemporary justice statistics shows that the pattern of Pacific offending has barely shifted since the 1960s (save for driving-related offences which were not included in Trlin's study).[107]

Based on this data, Trlin claimed that:[108]

> West Samoans, despite their apparent respect for property compared with the Māoris, could appear as the least desirable type of immigrant. Their conviction rates for sexual offences, assault, vagrancy, and drunkenness are far in excess of native-born rates [sic].

Further:[109]

> Offending is not a function of the quantum of any kind of blood. It may be a useful statistical artefact to label offenders by race. I wonder if it has further value. Do we go from there to the designation of the "worst" races, or do we look at the communal situation as a whole? We do have minority groups in New Zealand, e.g., Chinese and Greeks who prosper and abide by the law although it is doubtful whether they have surrendered their cultural identity.

Trlin also suggested that:[110]

> Samoan and Niuean young men achieve status with their fists, as young New Zealand males do in the football field. Should we turn a legal blind eye until they "settle down"? The problems are many and varied including one's socioeconomic status, the influence of alcohol, social and familial disintegration, housing problems, education and so on.

Although Trlin's comments are undoubtedly problematic, they nevertheless represent the dominant attitudes of Pākehā towards our community at the time. While Trlin did not provide any compelling argument for the "problem" of Pacific offending, his arguments align, although not neatly, with a disparate impact explanation emphasising the collective 'failure' of Pacific peoples to assimilate and integrate into New Zealand society. Notably, Trlin's analysis lacks any critical interrogation of why Pacific peoples found themselves in such socio-economic precarity, failing to consider racism, classism, xenophobia, and settler-colonialism.

In 1972, criminologist JM McEwen presented a paper at the New Zealand sociology seminar titled "Understanding Polynesians."[111] McEwen offered several explanations for the criminal behaviours of Pacific ethnic groups:

A. Cook Island Māori who have migrated to New Zealand:[112]
   [A]re perhaps a little more adventurous than the Samoans in that they move more easily into other parts of the country outside Auckland, but like other Pacific Islan-ders, they are still a Church-centred community. Those who maintain contact with the Church are less prone to conflict with the law.
B. Niueans can be perceived as "surly and stubborn", but this is largely due to nervousness and lack of confidence;[113]
C. Samoans:
   [I]t is amongst this group that a large proportion of the social disorder in Samoa occurs. When Samoans settle in New Zealand, the family system is often transplanted here. This has its good features and bad features... the tendency of Samoan families to protect members who have offended against the law, or to settle inter-family troubles amongst themselves, sometimes leads to misunderstandings or conflict with the Police.

McEwen continued to make "general comments" about Polynesian crime, grouped according to the following themes: attitude to property, language difficulties, musu, reaction to insults, fatalistic attitude, negative questions, and clannishness. We touch on each of these, in turn.

108 Trlin, above n 106, at 14.
109 At 14.
110 At 14–15.
111 JM McEwen "Understanding Polynesians" (Criminology Seminar, Victoria University of Wellington, 1972) at 7.
112 At 4.
113 At 5.
114 At 5.

"ATTITUDE TO PROPERTY"

McEwen argues that there is a difference between how Polynesians and Europeans view and treat property. For example, "Polynesians believe personal property is viewed communally as opposed to that of the individual."[114] He goes on to suggest that "it is quite clear that many Polynesians have found themselves in court for theft when they were simply borrowing an overcoat from another person living in the same group."[115] No evidence is offered to substantiate this claim. While it is generally true that we do not always share the same individualistic attitudes to property as Pākehā, it is a leap of logic to infer that we have a greater propensity for theft and burglary.

"LANGUAGE DIFFICULTIES"

McEwen argues that Pacific peoples' educational shortcomings affect how we engage with the justice system. In our view, this claim holds some truth given that many third and fourth-wave migrants did not receive a tertiary (nor even secondary) education, and it was likely that many were not fluent in English. He goes on to say that "the majority of Polynesians would be incapable of understanding the official language of a normal police charge" [116] and that conducting a police interrogation would be "near impossible" without a language interpreter.[117]

He then compared a Pacific person's poor English to that of a deaf person:[118]

> In order to elicit a reaction they [Polynesians] will speak louder and louder to make himself understood. This is a natural thing [for the Polynesian] to do, but in fact accomplishes nothing except, possibly to frighten the person being examined.

In our view, these racist and ableist hyperboles tar the discussion. Moreover, McEwen does not critically engage with how specific systems, structures and agencies impacted how our community engaged with the justice system. These include the apparent power imbalances between state authorities and new migrants, the concentration of police in predominantly Pacific communities, the lack of Pacific Island legal advocates and language interpreters (especially during police questioning and in the courtroom), and the inaccessibility to information about the justice system.

"MUSU"

McEwen draws on the Samoan concept of musu, a word used to describe someone who is withdrawn, introverted, and displays "a deadpan look and will say nothing except in an occasional monosyllable."[119] He suggests that when we are in the presence of authorities (e.g. the police) and strangers we exhibit "musu."[120]

In our view, McEwen would have benefitted from discussing the meaning of musu with Samoan people to properly understand its cultural nuances and avoid making superficial assumptions based on a person's demeanour.

115 At 7.
116 At 7.
117 At 8.
118 At 8.

"REACTION TO INSULTS"

McEwen argues that a "large percentage of the fights that involve Island Polynesians arise from aggressive reaction to insults or fancied insults."[121] He states that when people have an imperfect understanding of English, it is difficult to understand the difference between sarcasm, a light-hearted remark, and an offensive remark.

He claims that Samoans and Niueans are the quickest to resent an insult directed at them and are likely to respond aggressively. He suggests that when dealing with Polynesians "it is best not to use sarcasm or remarks which could be misinterpreted", arguing that sarcasm is not part of our culture and is considered extremely rude. He also claims that Pacific islanders generally display a pleasant demeanour unless intoxicated.[122]

"FATALISTIC ATTITUDE"

McEwen contends that this is one of the main reasons why many Pacific people, especially Niueans, offer guilty pleas. He suggests that we have a fatalistic attitude when interacting with Police and as a result "will sometimes plead guilty to offences they have not committed. Sometimes this is due to a misunderstanding of the nature of the charge and sometimes to fatalism."[123]

This assertion is based on McEwen's work in the Niuean High Court where he witnessed Niuean men plead guilty to serious offences they had not committed. He concludes that there is a correlation between the experiences of offenders in Niue and the low number of acquittals for Niueans in New Zealand courts.

He does not explore why some Pacific people express a "fatalistic attitude" and assumes that it is due to our lack of knowledge about the justice system. We suggest that our deference to authority (especially amongst the older generations) might be a contributing factor here. However, the basis for our assumed "fatalism" is not comprehensively explored.

"CLANNISHNESS"

McEwen argues that our "clannishness" trumps honesty as "the clan will endeavour to protect each other and conceal information."[124] While it is not controversial to suggest that our collectivist values mean we take great pride in showing loyalty to our family and community, it is a stretch to suggest that this makes us dishonest. McEwen goes on to state that, when dealing with Pacific offenders, authorities need to include their families.[125] He argues that because "the man is the head of the household" it is preferable for the authorities to interview our fathers first. While we have some scepticism on the latter point, this suggestion is supported in contemporary youth justice scholarship that encourages a collective, family-orientated approach when dealing with young offenders.

119 At 8.
120 At 8.
121 At 8.
122 At 8.
123 At 9.
124 At 9.
125 At 9.
126 LSW Duncan "Crime by Polynesians in Auckland: An Analysis of Charges Laid against Persons Arrested in 1966" (MA thesis, University of Auckland, 1970) at 260–272.
127 At 260.

This is seen in the Pacific Youth Court and restorative justice practices like the Family Group Conference (FGC). Overall, McEwen's paper raises some salient points about the possible explanations for Pacific offending. However, the absence of any qualitative engagement with Pacific communities means many of the arguments are laden with assumptions. This highlights the danger of non-Pacific researchers talking over and above our communities and then presenting their "findings" as fact.

In 1970, legal scholar LSW Duncan explored the cultural reasons for Pacific offending in "Crime by Polynesians in Auckland: An Analysis of Charges Laid against Persons Arrested in 1966."[126]

The introductory remarks include a caveat that the ideas expressed are "current among those" working in sociology in the 1960s–1970s. These ideas included:

"ATTITUDES TO DRINK"

Duncan argues that "Polynesians possess a different attitude to alcohol than New Zealanders" and that we "drink to get drunk."[127] He contends that we have had difficulty adjusting to New Zealand's social norms around alcohol consumption and are also more likely to take insults seriously. He suggests that the risk of incidents involving Pacific peoples and alcohol is higher as we are more "unpredictable" than Pākehā.[128] He posits "that the cultural basis of this prediction is different from that of New Zealanders in the same situation."[129]

No evidence is given for the assertion that Pacific peoples "drink to get drunk", nor anything to support the claim that Pākehā are somehow more respectful and conservative in their drinking habits. While there is some merit in his suggestion that Pacific adults might have had more significant difficulties adjusting to the accessibility (and relative affordability) of alcohol in New Zealand, assuming that alcohol triggers aggression within us is borne from racist, pseudo-scientific stereotypes that have since been dismissed.

Furthermore, Duncan omits any suggestion that Pākehā New Zealanders can also engage in violent or abusive behaviour when drunk. In our view, these comments affirm a broader assumption that White people are inherently more virtuous and respectable.[130]

"ATTITUDES TO FIGHTING"

Duncan argues that Pacific men are prone to fighting. He states:[131]

> Several informants have mentioned that in Samoa the status of young men is enhanced by their prowess with their fists, in much the same way as that of New Zealanders is by their ability on the football field. In Samoa fighting is an accepted pastime, formally as a sport in Boxing clubs but also informally in everyday situations. Once a fight has started, the matter that gave rise to the incident is settled and when the fight is over, I am told, the matter is ended.

128 At 260.
129 At 262.
130 See Derald Wing Sue "The Invisible Whiteness of Being: Whiteness, White Supremacy, White Privilege, and Racism" in Madonna G Constantine and Derald Wing Sue (eds) *Addressing Racism: Facilitating Cultural Competence in Mental Health and Educational Settings* (John Wiley & Sons, New Jersey, 2006) 15.
131 Duncan, above n 127, at 262–263.

This, as Duncan claims, explains our higher rate of assault charges. However, he does not reveal any information about his "several informants" nor the basis for his assertion that fist fighting is a Samoan cultural pastime. In our view, this claim evokes the same racialised stereotypes that Samoan and/or Pacific men have a natural disposition for physical aggression and/or violent outbursts and wrongly attributes this to Pacific cultural norms and traditions.

"HIGH RENTS AND OVERCROWDING"

Duncan suggests that "while some believed overcrowding should not be a concern,[132] others thought that close physical proximity and crowding in certain (then impoverished) areas like Ponsonby, Newton and Parnell, when coupled with the cultural displacement of urban migration,[133] caused much intergroup rivalry and tension."[134] In Duncan's view, this drives our offending.[135]

Although he does not elaborate further on this point, this insight does invite critical discussion about the correlation between housing precarity as a driver of offending, especially concerning family violence, theft, and burglary. Notably, in the last 20 years, there has been a significant body of scholarship identifying poverty-related stressors as one of the critical drivers of family harm.[136]

"WORKING PARENTS AND SUPERVISION OF CHILDREN"

Duncan argues that Pacific youth are more likely to offend because their parents have to work more than one job and therefore have less time to supervise their children.[137] He contrasts this to village living in the islands where "children could play in the local area and still be within the supervision of the people responsible for them."[138] Whereas in an urban New Zealand environment, Pacific youth "need to go only a few houses away to be among disinterested strangers."[139]

In our view, Pacific youth offending is a complex topic that remains one of the most pressing issues affecting our community. While there is something to be said about the relationship between parental supervision (or lack thereof) and youth offending, that is not causative in and of itself. Duncan's analysis does not engage with the socio-economic drivers that can lead to youth offending, cultural identity issues, the lack of educational opportunities afforded to Pacific youth at the time, and intergenerational trauma.

Scholars, including Julia Ioane, Camille Nakhid, and Tamasailau Sua'ali'i-Sauni, have more comprehensively explored these contexts.

"POLICE ATTITUDES"

Like his contemporaries, Duncan explores whether police attitudes toward Pacific peoples led to higher crime rates. He suggests that:[140]

> Polynesian peoples' darker skin makes them more visible.
> Polynesian peoples are a minority group.
> Polynesian peoples are refined to small sections of the community.
> If a victim gives a description of a potential offender as "Polynesian", Polynesian suspects are thus more likely to be apprehended as the Police have a smaller area to search.
> Polynesian peoples face language barriers and might be unaware of their rights.
> Polynesian crime rates have received much publicity, drawing attention to Polynesian people in the community.

Duncan draws on the prominent theoretical explanations for the higher crime rates of ethnic minorities widely circulated at the time, including cultural conflict theories,[141] ecological theories,[142] and ethnic community cohesion theories.[143] His comments around the relationship between Pacific peoples and police are, in our view, the most helpful as it is supported by the relevant scholarship and remains salient in their discussion of racial profiling, colourism, deviancy amplification, language barriers and the role of mainstream news media in sensationalising 'Polynesian' offending.

Our overall impression from the preceding scholarship is how the authors attribute the 'problem' of Pacific offending to our community's failure to assimilate into the New Zealand 'way of life'. However, this framing lacks any serious interrogation into the racist assumptions laden therein and whether such a 'way of life' is even appropriate for us.[144] The 'assimilation problem' places the onus on us to resolve our perceived acculturation 'deficit' rather than understanding how the interlocking forces of systemic oppression under colonialism, capitalism, racism, and cis-heteropatriarchy shape New Zealand society. The preceding analyses also fail to question the relevant socio-cultural forces that characterised Pacific offenders as violent, drunken, uneducated and culturally maladapted fiends. With some exceptions, much of the commentary is racism repackaged as theory.

We debated whether it was appropriate to quote the authors' many unsubstantiated assumptions, racist caricatures, and pseudo-scientific theories about our community.

On the one hand, there is power in refusing to re-circulate harmful narratives that have plagued our community for too long.[145] On the other, it is also important to expose how this work — for better or worse — has influenced how others have come to theorise, problematise and discuss the issue of 'Pacific offending' in later years. We offer their words as a cautionary tale, imploring us all to stop uncritically fortifying the intellectual legacies of non-Pacific peoples and instead amplifying the wisdom of our communities.

132 At 267.
133 At 265.
134 At 268.
135 At 268.
136 Te Aorerekura *Analysis: Pacific peoples* (March 2022).
137 Duncan, above n 127, at 268.
138 At 269.
139 At 269.
140 At 270–272.
141 At 273–294.
142 At 277.
143 At 286.
144 Jackson, at 121.
145 Burgess, Cormack and Reid, above n 8; and Audra Simpson "The ruse of consent and the anatomy of 'refusal': cases from indigenous North America and Australia" (2017) 20 Postcolonial Studies 18.

Pacific Peoples and Gangs

By the 1970s, Polynesian Youth Gangs (as they were then known) were under public scrutiny, leading to the establishment of the Joint Committee on Young Offenders. JA Jamieson argued that youth gangs were a cultural response to the urban environment, citing:[146]

> Failure at school, lack of communication with their parents, feelings of alienation from their community are all social factors which cause young people to seek satisfaction, acceptance, and self-esteem within their own like-minded peer group. These children cannot be described as emotionally disturbed but are rather the product of a "cultural void."

Furthermore, "they are children who have not been adequately socialised, either in Māori or Pākehā cultures."[147]

Sociologist Jarrod Gilbert has written extensively on the rise and development of gangs in Aotearoa New Zealand, particularly on the Government's Group Employment Liaison Schemes (GELS). These schemes were introduced by Muldoon's National Government in the mid-70s to combat rising unemployment.[148] Gilbert notes that, until 1986, the involvement of gangs in the GELS created positive publicity as gangs embraced the work and membership numbers remained steady.

However, Gilbert finds that this perception shifted when many were falling into unemployment and the gangs appeared to be "rich".[149] As a result of public and political pressure, the Labour government ended the work schemes.[150] From the mid-1980s onwards, the absence of the schemes coupled with rising unemployment made it more difficult for gang members to exit the gangs and find work.[151] Furthermore, Gilbert notes that the deteriorating economic environment of the 1980s and 1990s was a contributing factor to gang maturation.[152]

The expansion of Māori and Pacific gangs is generally considered to have started in the 1970s, with claims that they formed as a result of our people being brutalised by police and/or abused in state care.[153] However, recent data on the number of Pacific gangs and gang members are slim. The most recent data from July 2014 on adult gang members found that 8 per cent of adult gang members are Pacific people.[154]

Camille Nakhid has produced an array of literature on Pacific youth and gangs in Aotearoa New Zealand. Nakhid conducted qualitative studies with interviewees from South Auckland, both involved and uninvolved with gangs. Nakhid's literature often focuses on the concepts of family, how this relates to gang involvement, and youth perceptions of gangs in their communities.

146 JA Jamieson "The Police and Ethnic Minorities" in Graham Vaughan (ed) *Racial issues in New Zealand* (Akarana Press, Auckland, 1972) at 50–51.
147 At 51.
148 Jarrod Gilbert "The Rise and Development of Gangs in New Zealand" (PhD Thesis, University of Canterbury, 2010) at 354.
149 At 372–373.
150 At 401.
151 At 427.

Nakhid's article "'Which Side of the Bridge to Safety?'" highlighted participants' views that the under-resourcing of the community forced young people onto the streets and into gangs.[155] Gang members noted in this study that "if the economic and social situation in South Auckland was not addressed, gang activity would only escalate."[156]

The *Pacific Families Now and in the Future: Pasifika Youth in South Auckland* report provides a comprehensive insight into the role of gangs in the Pacific community.[157] The report interviewed different focus groups from Mangere and Otara, including gang and non-gang members. It identified that gang members did not "give up" (as is often assumed) their biological ("blood") family for their gang family.[158]

The report also found that participants in gangs gave their blood families priority over their gang families.[159] However, participants identified that gangs provided an alternative family environment where there was an "acceptance of their identity, unconditional support of their lifestyle and financial assistance", much of which they were unable to find in their blood family.[160]

In this way, the gangs offered a more comprehensive system of pastoral and financial support for their members.[161] Some participants attributed the proliferation of Pacific youth involvement in gangs to the failure of the education system to provide for the specific needs of these students.[162]

Participants also identified that if students were unable to access opportunities at school, they would seek out other avenues with some turning towards gangs.[163] Furthermore, some participants identified that the often hostile relationship between police and gangs aggravated Pacific youth perceptions of police and authority figures. Members of the Birdies gang viewed the police as just another gang who were advantaged "because of their role as a legitimate organisation."[164]

Notably, gang members did not believe that their relationship with police would change by having Pacific police officers. They noted that Pacific police officers were "rough[er] with the islanders."[165] However, the CWI gang participants believed that respect from government organisations was necessary to obtain gang cooperation.[166] Ultimately, the responses highlighted the comparison between the social conditions — particularly the role of social institutions — that allowed gang culture to develop in the United States of America and Aotearoa New Zealand.

152 At 411 and 415.
153 Camille Nakhid "The Meaning of Family and Home for Young Pasifika People Involved in Gangs in the Suburbs of South Auckland" (2009) 35 Social Policy Journal of New Zealand 112 at 114; see also Statement from Professor Tracey McIntosh to Abuse in Care Royal Commission of Inquiry regarding Brief of Evidence for Contextual Hearing in relation to the Royal Commission of Inquiry into Abuse in Care and Faith Based Institutions (November 2019).
154 Ministry of Social Development *Adult gang members and their children's contact with Ministry of Social Development service lines* (March 2016) at 1.
155 Camille Nakhid "'Which side of the bridge to safety?" How young Pacific Islanders in New Zealand view their South Auckland community" (2012) 7 Kōtuitui: New Zealand Journal of Social Sciences Online 14 at 17.
156 At 19.
157 Camille Nakhid, Tupetoa Ronji Tanielu and Efeso Collins *Pacific Families Now and in the Future: Pasifika Youth in South Auckland* (Families Commission, Report No 2/09, November 2009).
158 At 56.
159 At 44.
160 At 57.
161 At 47 and 57.
162 At 45.
163 At 41.

Pacific Victims of Criminal Offending

There is little qualitative research on Pacific people harmed by crime. The New Zealand Crime and Victims Survey (NZCVS) provides the most comprehensive data on victims in Aotearoa New Zealand. Results of the 2018–2019 Cycle found that:[167]

A. Across all criminal offences committed in the 24 months, we are equally likely to be victims of crime when compared with the national average.[168]
B. We are significantly more likely to experience offences towards our households (24 per cent) compared with the national average (20 per cent).[169]
C. We are less likely to experience sexual violence in our lives (19 per cent) compared with the national average (24 per cent).[170]
D. We are significantly less likely to experience theft and damage offences (2 per cent) compared with the national average (5 per cent).[171]
E. We are more likely to report that racial discrimination as a driver of harm (13 per cent) compared with the national average (7 per cent).[172]

The results of the earlier NZCVS Cycle 1 are broadly comparable.[173] However, notable data from this report include that Pākehā experience less physical or psychological family violence compared to Māori (70 per cent less likely) and Pacific peoples (44 per cent less likely).[174]

The Ministry of Justice released the Cycle 3 NZCVS report in June 2021. While primarily reflecting the findings of the Cycles 1 and 2, data collection during the COVID-19 pandemic was suspended numerous times and a lower number of responses were retrieved.[175] Cycle 3 found that Pacific peoples, alongside Pākehā and Indians, were equally likely to be victims of crime when compared with the national average.[176]

Furthermore, the critical findings in Cycle 3 featured, for the first time, comparisons over the three Cycles and an analysis of the pooled data. Generally, Cycle 3 found that;

164 At 50.
165 At 50.
166 At 53.
167 Ministry of Justice *Key findings: Results drawn from Cycle 2 (2018/19) and pooled data of the New Zealand Crime and Victims Survey* (May 2020).
168 At 39.
169 At 39.
170 At 73.
171 At 74 and 76.
172 At 112–113.
173 Ministry of Justice *Key findings: Results drawn from Cycle 1 (March – September 2018) of the New Zealand Crime and Victims Survey* (May 2019) at 35, 72, 84 and 136.
174 At 72.
175 Ministry of Justice *Key findings: Results drawn from Cycle 3 (2019/20) of the New Zealand Crime and Victims Survey* (June 2021) at 4.
176 At 8.
177 At 8.
178 At 9.
179 At 9.
180 At 10.

A. The level of overall victimisation has remained stable over time (from Cycles 1–3);[177]
B. Accounting for differences in the average age between people with a disability and those without a disability, people with disabilities were significantly more likely to experience crime across all offences (personal offences, overall household offences, burglary, and interpersonal violence offences);[178]
C. Households in the Auckland region were significantly more likely to experience overall household offences and burglaries;[179]
D. The proportion of non-reporting for all broad offence groups was consistent over three NZCVS cycles.[180]

The Cycle 3 report scarcely mentions us as victims. The Cycle 3 Methodology Report notes that 504 Pacific people were included in the sample size: 308 women and 196 men.[181] Five hundred and three Pacific respondents out of 7,425 meant that we were 6.8 per cent of the sample size, a slight underrepresentation of our total population. Additionally, the Cycle 3 Methodology Report reveals that the statistical classification of Pacific peoples in the survey changed from the previous two cycles.

Cycles 1 and 2 Methodology Reports recorded specific Pacific ethnicities — Samoan, Cook Island Māori, Tongan and Niuean — whereas Cycle 3 Methodology Report did not disaggregate Pacific ethnic groups.[182]

To better understand the experiences of Pacific survivors moving through the justice system, a 2003 report by Dr ʻAna Koloto provides the most comprehensive analysis.[183] Koloto's study was commissioned by the Ministry of Justice and designed to complement the quantitative data from the New Zealand National Survey of Crime Victims 2001, addressing the paucity of data on Pacific victims.[184] The study was based on the experiences of 90 participants and noted that this sample should not be used to generalise over the wider Pacific population throughout Aotearoa New Zealand.[185] In determining victims' needs, the report considered the nature of the offending, the impact of the offending, the needs of victims of violent offending, the appropriateness of support services, and victims' experiences of the justice system.

Key findings include:[186]

A. The need to acknowledge that family violence is unacceptable, although some may consider it culturally appropriate.
B. Appropriate programmes to eliminate domestic violence must involve Pacific male offenders.
C. Appropriate counselling services and support would come from Pacific ser-vices organisations or Pacific staff in victim support agencies.

181 Ministry of Justice *New Zealand Crime and Victims Survey: Methodology Report Cycle 3 (2019/2020)* (June 2021) at 54.
182 At 72; Ministry of Justice *New Zealand Crime and Victims Survey: Methodology Report Cycle 1 (2018)* (May 2019) at 78; and Ministry of Justice *New Zealand Crime and Victims Survey: Methodology Report Cycle 2 (October 2018 – September 2019)* (May 2020) at 77.
183 ʻAna Hauʻalofaʻia Koloto *The needs of Pacific Peoples when they are victims of crime* (Ministry of Justice, Wellington, May 2003).
184 At 11.

The need for appropriate services is reiterated in further findings:[187]

A. "The most effective forms of informal support … were 'family', 'family and friends', and 'friends'."[188] For some participants, this included their pastor and church family. The latter was reported to have played a key role in healing and gave supportive advice to several participants.[189]
B. The most frequently used formal support services were victim support, medical centres or emergency departments in hospitals, and Pacific service providers.
C. Provision of and access to Pacific Social Services and Pacific staff who could speak their language(s) were the support services most frequently recommended by more than half of the participants.
D. The results also revealed the need for improved services by the police in three areas. These include the availability of the police to attend the crime scene; the need for a prompt response to their reporting of the crime, particularly in the cases of family violence; and the need for the police to keep victims informed about the progress of their case(s).

The study's results also highlighted a certain level of dissatisfaction with police engagement in their case. The report noted that it is important that victims' needs be better met to avoid hostility towards the police.

Victims' experiences in the justice system found that 62 per cent of the participants found the police accessible and were satisfied with the effectiveness of the police response.[190] Thirty-eight per cent were dissatisfied with police, citing delays in responding to their telephone calls and lack of information during the process of their cases as the key reasons for their dissatisfaction.

In terms of Pacific-focused victim support groups, the approach appears to focus on training non-Pacific providers on how to deliver services using cultural frameworks.[191] However, in 2014 an Auckland chapter of the Samoa Victim Support Group was launched, providing services and shelter for victims of sexual abuse and domestic violence.[192] Other than this group, it would appear that general Pacific service providers are offering the most comprehensive and effective support for Pacific victims of crime.[193] This makes sense, given that those services are designed following Pacific cultural values, knowledge, and practices and administered by predominantly Pacific personnel.

Our people are most frequently harmed in the family violence context.[194] Family violence includes intimate partner violence (IPV), child abuse, and elder neglect and encompasses a broad range of behaviours, such as physical, sexual, and psychological abuse. As of 2019, we were one in every ten offenders who committed serious harm against a family member.[195] Moreover, we are 44 per cent more likely to experience physical or psychological violence in the home compared to Pākehā.[196]

The Ministry of Social Development (MSD) identifies how our lower-income bracket, youthful population, young motherhood, family size and increased instances of psychological distress in our men as being the primary risk factors.[197] Much of this harm is most felt by our children, who are 2.5 times more likely to be physically punished than non-Pacific children and who have higher rates of hospitalisation due to assault, neglect and maltreatment.[198]

In 2019, the MSD commissioned a qualitative research report on our young people's experiences of family relationships and family violence.[199] Seventy-one participants aged 12–24 participated. The study found that family violence negatively impacted their relationships with their parents, normalised abusive behaviour, inhibited healthy forms of communication and expression, and created feelings of helplessness, despair, and emotional and social withdrawal.[200]

Participants identified that the key barriers to help-seeking included victim-blaming attitudes within their families and community, a culture of silence and shame, cultural values to uphold respect, a desire to maintain the integrity of the family unit despite the dysfunction, and fear of and for perpetrators.[201] A dominant theme emerging from research was the gendered dynamics in family violence, with participants citing male dominance and abuse of power as the primary risk factors.[202]

The research also identified our low socioeconomic position and poor health and well-being as determinants leading to high stress and addictive behaviours.[203] Over the past 20 years, there has been a significant body of scholarship, writing and commentary by Pacific authors, researchers and academics on family violence in our communities.[204] There is a recurring emphasis across all the research that "[Pacific] culture is strongly considered to hold a vital role in addressing family violence in Pacific communities."[205]

185 At 85
186 At 13–15.
187 At 14.
188 At xiv.
189 At 45–46 and 87.
190 At 15.
191 Ministry for Pacific Peoples "Tackling Pacific family violence" (27 April 2020) <www.mpp.govt.nz>.
192 Pacific Waves "Aucklanders back Samoa victim group" (14 November 2014) Radio New Zealand <www.rnz.co.nz>.
193 Ministry for Pacific Peoples, above n 193.
194 Fuafiva Fa'alau and Sharyn Wilson *Pacific perspectives on family violence in Aotearoa New Zealand* (New Zealand Family Violence Clearinghouse, Issues Paper 16, June 2020).
195 Pasefika Proud *Pacific Peoples in New Zealand: Understanding family violence* (Ministry of Social Development, April 2019) at 1.
196 At 1.
197 At 2.
198 At 1-4.
199 Malatest International *Young Pacific people's understandings of family violence* (Ministry of Social Development, February 2021).
200 At 5–7.
201 At 5–7.
202 At 5–7.
203 At 5–7.
204 For a detailed analysis, see Pacific Advisory Group *Programme of Action for Pacific Peoples 2008 and Beyond* (Ministry of Social Development, February 2009); Jennifer Hand and others (eds) *Free from Abuse: What Women Say and What Can be Done* (Auckland District Health Board, Auckland, 2002); Maiava Carmel Peteru *Falevitu: A literature review on culture and family violence in seven Pacific communities in New Zealand* (Pasefika Proud (Ministry of Social Development), March 2012); Sarah McRobie and Margaret Agee "Pacific counsellors' use of indigenous values, proverbs, metaphors, symbols and stories in their counselling practices" (2017) 37 New Zealand Journal of Counselling 103; Jenny Rankine and others "Pacific Peoples, Violence, and the Power and Control Wheel" (2017) 32 Journal of Interpersonal Violence 2777; Gemma Malungahu and Vili Nosa *Family Violence Initiatives and Pacific Men: Literature Review* (Pasefika Proud (Ministry of Social Development), 2016); and Lanuola Asiasiga and A Gray *Intervening to prevent family violence in Pacific communities: A literature review for the offending by Pacific peoples project* (Ministry of Justice, 1998).

In 2008, the Pacific Advisory Group was established to provide a Pacific response to family violence. From that, the Nga Vaka o Kāiga Tapu framework was developed to address family violence in Pacific communities and recommend culturally appropriate responses to harm.[206] Broadly, the framework recommends "incorporating the cultural knowledge, skills and tools from each Pacific ethnic group" as "paramount and useful for addressing family violence in the homes."[207] Across the literature, it is widely agreed that mainstream approaches to addressing family violence — including service delivery, policies, strategies, resource allocation, education, and therapy — are steeped in Euro-centric paradigms that "do not align with Pacific ideologies and the ways [Pacific people] restore harmony and healings within their homes."[208] For example, the oft-used FGC does not always sit well with our communities:[209]

> [I]t is culturally inappropriate to sit parents and other family members together to bring about a desired outcome. It may not achieve the goal of giving every member a "voice" to contribute to a positive plan going forward. A group of men may find it difficult to voice their individual thoughts and emotions collectively facilitated by a professional but may engage and attend meetings more readily if there is a spiritual head, such as a priest or pastor to accompany the practitioner when facilitating discussions. Holistic approaches that acknowledge and respect cultural spaces and relationships work better than trying to fit culture into western paradigms that do not accommodate cultural significance.

Helena Kaho critiques the current non-violence programmes under the Domestic Violence (Amendment) Act 2013 in her piece "'Oku Hange 'A E Tangata, Ha Fala Oku Lālanga — Pacific people and non-violence programmes under the Domestic Violence (Amendment) Act 2013."[210] Kaho argues that mainstream programmes are rooted in individualism which is at odds with the pan-Pacific value of collectivism.

Kaho posits that this individualistic focus means that mandatory non-violence programmes fail to change violent behaviour.[211] Notably, Kaho highlights that "employing an individualistic treatment framework … alone will not reach Pacific respondents in the ways their communities can."[212]

Kaho concludes that "it is imperative that these fundamental cultural differences are acknowledged and addressed in future legislation so that there is a clear steer on the focus for research and policy."[213] This call for acknowledging cultural differences is a key requirement for violence intervention programmes and effective support services for survivors of interpersonal harm. In our view, further research into and assessment of the violence prevention programmes that developed after the introduction of the amendments to the Domestic Violence Act is needed.

205 Fuafiva Fa'alau and Sharyn Wilson *Pacific perspectives on family violence in Aotearoa New Zealand* (New Zealand Family Violence Clearinghouse, Issues Paper 16, June 2020) at 9.
206 Tuvalu Working Group *Nga vaka o kāiga tapu: A Pacific Conceptual Framework to address family violence in New Zealand* (Pasefika Proud (Ministry of Social Development), March 2012).
207 Fa'alau and Wilson, above n 196, at 10.
208 At 11.
209 At 11.
210 Helena Kaho "'Oku Hange 'A E Tangata, Ha Fala Oku Lālanga' — Pacific people and non-violence programmes under the Domestic Violence (Amendment) Act 2013" [2017] NZWLJ 182.
211 At 182.
212 At 189.
213 At 190.

Pacific Peoples' Perceptions of the Justice System

We can glean some sense of our communities' perceptions of the justice system based on the findings from the *Social wellbeing and perceptions of the criminal justice system: Cycle 2 (October 2018 – September 2019)* survey.[214] The survey provided participants with a series of closed, multi-choice questions about their experiences of crime and the justice system. A common thread running through the report is the disparities in the views and experiences of persons across ethnic groups. For example, Pākehā tend to report higher levels of social well-being than members of other ethnic groups, especially regarding their trust in others.

The survey further found that:[215]

> Pacific peoples and Indians tend to worry more about being the victim of a crime than other New Zealand adults. Māori and Pacific peoples are less likely than people of other ethnicities to agree that New Zealanders are treated fairly by the Police. And Māori, Chinese and Pacific adults all less likely to feel that their values align with the justice system than other adults. These findings support calls for the criminal justice system to better reflect the diverse values and needs of [a multi-ethnic society].

Finally, one in five Pacific peoples worry all or most of the time about being a victim of crime, compared to five per cent of Pākehā.[216] Notably, the difference in the experience of crime for these two groups is minimal and not statistically significant (32 per cent compared to 31 per cent), which invites further exploration as to why we have disproportionately higher levels of anxiety about being the victims of harm. While the survey paints a broad picture of some of the critical issues we face when engaging with the justice system, its methodological limits mean that the stories behind the numbers are not explored.

State Care and the Justice System

In 2018, the Government formed the Abuse in Care – Royal Commission of Inquiry to independently investigate the abuse of children, young persons, and vulnerable adults while in state care or the care of faith-based institutions between 1950 to 1999.[217] The final

214 Ministry of Justice *Social wellbeing and perceptions of the criminal justice system: Cycle 2 (October 2018 – September 2019)* (New Zealand Crime and Victims Survey, 2020).
215 At 8–9.
216 At 24.
217 This includes girls' and boys' homes, youth justice residences, foster care, psychiatric and disability care, and different types of schools; the inquiry is also mandated to look at situations of abuse outside of those years until the present day.

report is scheduled for completion in 2023. In August 2022, the Commission released its *Care to Custody: Incarceration Rates* report that analysed interagency records of more than 30,000 children and young people from 1950 to 1999.[218] The report found that:[219]

> [O]ne in five and, sometimes, as many as one in three of those children and young people ... went on to serve a criminal custodial sentence later in life. This is a much higher rate than those who had not been in State care.

As Aaron Smale writes:[220]

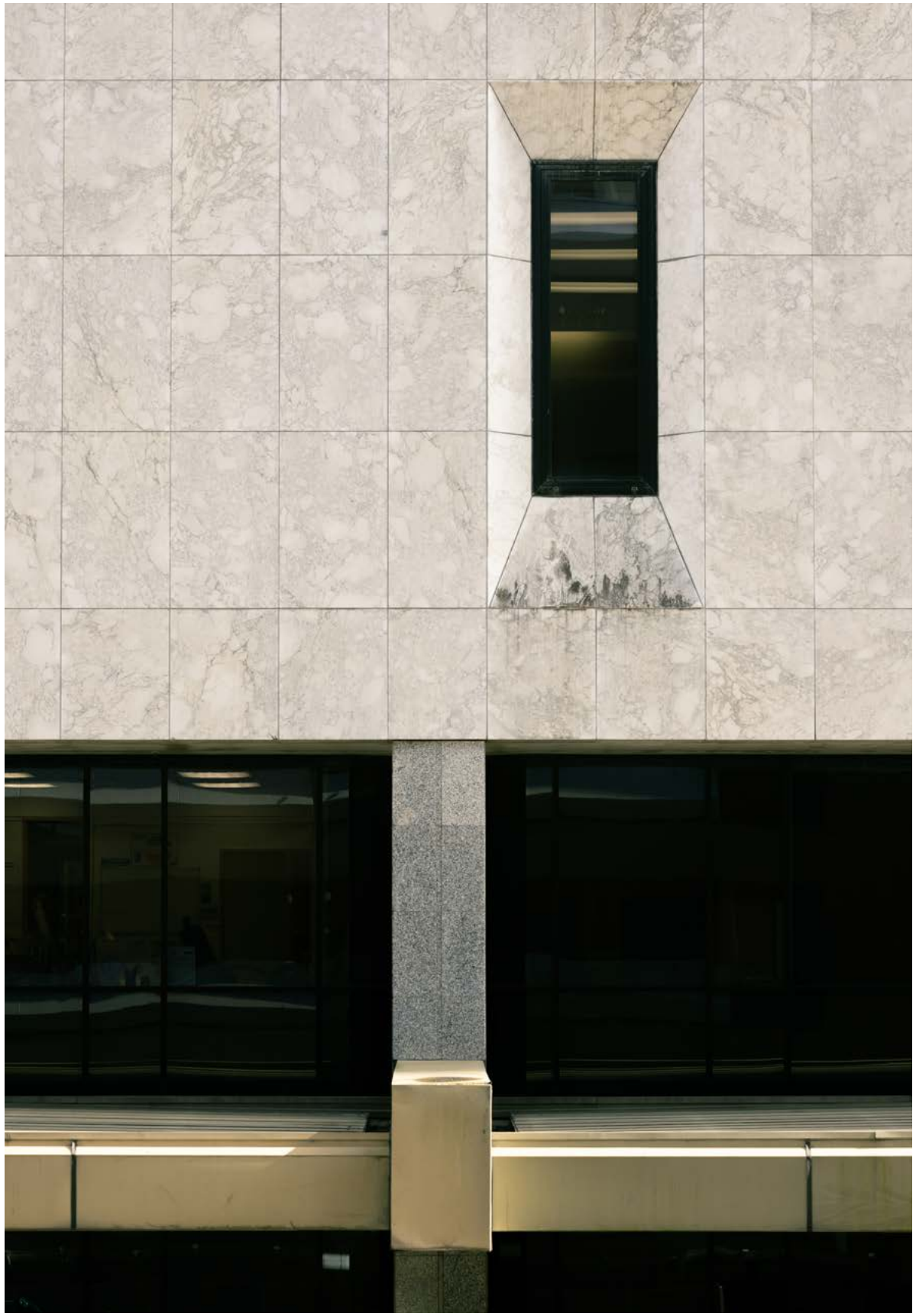
> [T]he Royal Commission on Abuse in Care has confirmed what many have always known — a major percentage of those who went through the welfare system as children end up filling the country's jails.

The report identified that Māori placed in state care were "usually around four to seven times more likely to receive a custodial sentence than their matched cohort."[221] This finding is unsurprising given the overwhelming evidence correlating the presence of Māori in state care to colonisation, land dispossession, alienation and institutional racism.[222] Notably, the report compared the data between Māori and non-Māori with the latter combining European, Pacific peoples, Asian, Middle Eastern, Latin American, African and Others into one. As such, we cannot accurately identify the percentage of Pacific people in state care during that period who later became incarcerated.

However, the government has acknowledged that "a significant number of those removed from their families and placed in care were from Pacific communities, and that Pacific people have been adversely impacted by abuse in care."[223]

As we await the findings from the inquiry's Pacific investigation team, we contend that any future research about our people and the justice system must be in conversation with the commission's findings.

218 Abuse in Care – Royal Commission of Inquiry *Care to Custody: Incarceration Rates* (August 2022).
219 At 4.
220 Aaron Smale "Royal Commission finds high number went from welfare to prison" (25 August 2022) Newsroom <www.newsroom.co.nz>.
221 Abuse in Care – Royal Commission of Inquiry, above n 220, at 12.
222 See Catherine Savage and others *Hāhā-uri, hāhā-tea: Māori Involvement in State Care 1950-1999* (Ihi Research, July 2021).
223 Abuse in Care – Royal Commission of Inquiry "Pacific people's experiences of abuse in care" <www.abuseincare.org.nz>.



Pacific Peoples and the Police

Police are the gatekeepers of the justice system, deploying a variety of formal and informal devices in their duties:[224]

> They decide when to stop, search, or arrest individuals, as well as selecting what types and how many offences people are initially charged with … [they] also decide which cases will be prosecuted.

The New Zealand police operate under the slogan "Safer Communities Together", with their primary objectives being "to prevent crime and crashes, improve public safety, detect [crime] and bring offenders to account, and maintain law and order."[225] Based on the number of apprehensions retrieved from Statistics New Zealand, there has been a gradual increase in the numbers of Pacific peoples apprehended by police from 1994 to 2011, accounting for population increases.[226] Police were unable to provide us with records prior to 1980.

The percentage of people apprehended by police whom they identified as 'Pacific' increased from 6.9 per cent in 1994 to 9.8 per cent in 2011. A drop-off occurred from 2012–2014 as the percentage decreased from 9.8 per cent in 2011 to 9 per cent in 2014. However, despite this decrease, we are still overrepresented in apprehension statistics compared to our population size.

Before we consider the relationship between Pacific peoples and the police, it is important to historicise contemporary policing practices within New Zealand's settler-colonial regime. In writing on the history of policing in New Zealand, Richard S. Hill found:[227]

> Māori signatories of the Treaty of Waitangi had been led to believe that chiefs would be allowed to continue to rule their tribes as before, but the British government vetoed even a plan recognising the continuance of Māori customary law and its control mechanisms in districts not significantly penetrated by Pākehā. The choice was made instead to extend regular judicial and administrative control as quickly as possible over such areas in order to participate both in land alienation and racial subjugation in general.

The legacy of colonial policing practices is comprehensively discussed by Trevor Bradley, Elizabeth Stanley, and Angus Lindsay in their chapter "Policing: Past, Present, and Future." They posit:[228]

224 Bronwyn Morrison *Identifying and Responding to Bias in the Criminal Justice system: A Review of International and New Zealand Research* (Ministry of Justice, November 2009) at 33.
225 "Role of the Police" New Zealand Police <www.police.govt.nz>.
226 Statistics New Zealand *Patterns in Police Apprehensions in New Zealand 2005/06 to 2008/09* (June 2010) at 17.
227 Richard S. Hill *The History of Policing in New Zealand: Policing the colonial frontier* (Volume 1, Department of Internal Affairs, New Zealand, 1986).
228 Trevor Bradley, Elizabeth Stanley and Angus Lindsay "Policing: Past, Present, and Future" in Elizabeth Stanley, Trevor Bradley and Sarah Monod de Froideville (eds) *The Aotearoa Handbook, of Criminology* (Auckland University Press, Auckland, 2021) 136 at 137.
229 At 137.
230 At 138.

> Colonisation is a crucial backdrop to the continued exercise of unfavourable police discretion toward [Māori]. Contemporary patterns of policing interactions with and the criminalisation of [Māori] (and other groups such as Pasifika and African young people) are grounded in and facilitated through hostile relationships of colonisation. ... The contemporary disproportional criminalisation of [Māori] also has to be understood against the backdrop of ongoing institutional racism or bias (conscious or otherwise) in policing.

The authors describe the early 19th-century Armed Police Force and its later iteration, the Armed Constabulary, as being "intensely militaristic", enabling the dispossession and confiscation of Māori land whilst quelling Indigenous resistance to settler-colonial interests.[229] As such, "policing remains a crucial mechanism of delivery for discriminatory, inequitable, and traumatising state actions experienced by Indigenous people, and through which all settler power relations are performed and upheld."[230] These historical dynamics, and their contemporary rhythms, are more fully explored in the works of Richard Hill,[231] Moana Jackson, Ani Mikaere[232], Juan Tauri,[233] Robert Webb,[234] Laura O'Connell Rapira and Kassie Hartendorp,[235] and Emilie Rākete,[236] amongst many others.

Historic Tensions Between Pacific Peoples and Police

This section is organised into three parts:

1. Creating the criminal 'Other' (1960s);
2. Ruptured relationships (1970s); and
3. The Terror of the Dawn Raids (1974 to 1977).

Creating the Criminal 'Other' (1960s)

The relationship between Pacific peoples and police (and the broader justice system) is intimately tied to our community being racialised as 'Other(s)'. By definition, "Othering" is when:[237]

> [An] individual or groups of people attribute negative characteristics to other individuals or groups of people that set them apart as representing that which is opposite to them. It refers to more than just stereotyping, as this can involve making generalizations about groups of people which may be positive or negative. Othering includes an affect component, where those that are othered are irrationally feared, even hated.

The 'Othering' of Black, Brown, and Indigenous peoples[238] within settler colonies has been deployed throughout history — frequently by politicians and the mainstream media — to justify racially/culturally discriminatory treatment.
As Saito contends (writing from the United States context):[239]

> Otherness must take concrete form in the popular imagination if it is to serve social functions. Racialization justifies the elimination and exploitation of colonized peoples by associating particular phenotypical characteristics, real or imagined, with the state of being "less-than"—less civilised, less intelligent, less capable, less trustworthy, less attractive.
>
> By the time settler society considered incorporating migrant Others, the racialization of identity was well entrenched, and it comes as no surprise that tropes used to denigrate and dehumanize American Indians and persons of African descent would also be utilized against other peoples of color.

The racialisation of Pacific peoples in Aotearoa New Zealand is a complex and multi-layered process informed mainly by New Zealand's imperial meddling throughout Te Moana-Nui-a-Kiwa in the 18th and 19th centuries.[240] Lana Lopesi writes that "Pālagi artists literally painted over the agency of Moana people, firmly establishing the tropes of noble savages and dusky maidens, in exoticised and romanticised ways."[241] Characterising Pacific peoples as 'nobles' and 'savages' made our lands and bodies ripe terrain for imperial conquest, fuelled by White cis-heteropatriarchal fantasies of the Moana as "'a feminised and sexualised space'."[242] This colonial domination and subordination patterns laid the groundwork for the capitalist exploitation of our communities in Aotearoa New Zealand since the mid-20th century.

In this way, capitalism and racism are "important ideological dimension[s] of the migrants' position in [New Zealand's] social relations" understood vis-à-vis "terms derived from [a hangover of] colonial history."[243] As Lopesi contends, these colonial fictions characterised us as quintessential docile labourers in service of New Zealand's settler-colonial vision:[244]

231 Richard S Hill *Policing the colonial frontier: the theory and practice of coercive social and racial control in New Zealand, 1787–1867* (Department of Internal Affairs Historical Publications Branch, Wellington, 1986).
232 Ani Mikaere Colonising Myths, Māori Realities: He Rukuruku Whakaaro (Huia, Wellington, 2011).
233 Juan Marcellus Tauri "Criminal Justice as a Colonial Project in Contemporary Settler Colonialism" (2014) 8 African Journal of Criminology and Justice Studies 20.
234 Robert Webb "Māori Experiences of Colonisation and Māori Criminology" in Antje Deckert and Rick Sarre (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave, Cham (Switzerland), 2017) 683.
235 Laura O'Connell Rapira and Kassie Hartendorp "Police and Pride: We need to heal our relationships first" (13 November 2018) RNZ <www.rnz.co.nz>.
236 Emilie Rākete "The whakapapa of police violence" (4 June 2020) The Spinoff <https://thespinoff.co.nz>.
237 Poul Rohleder "Othering" in Thomas Teo (ed) *Encyclopedia of Critical Psychology* (Springer, New York, 2014) 1306 at 1306.
238 We acknowledge that these groups are not mutually exclusive.
239 Saito, above n 61, at 135.
240 New Zealand was most dominant in Sāmoa, Tokelau, Rarotonga, Niue, and the Fijian archipelagos. See Kerry Howe "New Zealand's Twentieth-Century Pacifics: Memories and Reflections" (2000) 34 New Zealand Journal of History 4.
241 Lana Lopesi *Bloody Woman* (Bridget Williams Books, Wellington, 2021) at 88.
242 At 88.
243 Tamara Brigid Ross "New Zealand's 'Overstaying Islander': A Construct of the Ideology of 'Race' and Immigration" (Master of Arts in History Thesis, Victoria University of Wellington, 1994) at 175–176.
244 Lopesi, above n 243, at 91.

> Their [Pacific peoples'] utility is no longer sexual, no longer about reminding the corrupting Pālagi of what a more "simple" life could look like away from the corruption of modernity and capitalism; instead, they too become corrupted. Their "purity" is turned into something else: into labour.

Post-World War II, 'unskilled'[245] labour in the import-substitution industrialisation sectors was in short supply, with New Zealand's current and former Pacific territories providing an "inexpensive, convenient source of docile labour that could effectively dampen domestic wage demands."[246] New Zealand recruiters went to the islands encouraging Pacific workers to come here on temporary work visas for six to nine months at a time with the promise of good pay.[247] These recruitment agents worked as agents of the state, often paid a commission of NZD 50 per head.[248] Between 1945 and 1971, our population grew from 2,159 to 43,752.

By the 1960s, families had established networks of chain migration, concentrating their families in the inner-city Auckland suburbs of Ponsonby, Grey Lynn, and Freemans Bay. Cluny Macpherson writes:[249]

> Pacific Islanders settled in areas in which low-cost housing was available and which were close to where they worked in a relatively small number of occupations within a restricted range of industrial sectors in which wage rates were generally low but in which potential incomes were high.

In the early 1960s, we were still perceived as (economically) "valuable" given our high rates of workforce participation and willingness to work menial and "low skilled" jobs within the industrial sector. A *Listener* magazine article stated that "[i]n South Auckland some industries would collapse if the Polynesian Workforce was withdrawn."[250] By the mid-1960s, this primarily positive portrait of us as humble, docile workers was eclipsed by news reports describing us as violent criminal offenders. For example, a 1966 Sunday News headline read, "Colour crisis: Polynesian Crime Plunge Must Be Halted Now" as incidents of crime among Maori and Pacific islanders skyrocket.[251] More stories emerged blaming us for the increase in inner-city violence, drunken brawls, and assaults.[252] Popular newspapers *The Auckland Star* and *The New Zealand Herald* ran the headlines "CRIME – They're Polynesians" and "Gang Crime by 200 Children – A gang of about 200 Island children had built a formidable list of crime in the central Auckland area", respectively.[253]

245 We are critical of the demoralising and classist nature of this term.
246 Cluny Macpherson "'We are just New Zealander': Pakeha identity politics" in Paul Spoonley, David G Pearson and Cluny Macpherson (eds) *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 1996) 124 at 124.
247 Ross, above n 245, at 54.
248 At 54.
249 Macpherson, above n 248, at 126.
250 "Paradise Lost or Regained" *The Listener* (Wellington, 1 December 1973) at 12 as cited in James Mitchell "Immigration and National Identity in 1970s New Zealand" (PhD Thesis, University of Otago, 2003) at 158.
251 Ross, above n 245, at 24.
252 At 23.
253 At 24. NB: References to 'Polynesians' often included both Māori and Pacific peoples.
254 Angela Ballara *Proud to be White? A Survey of Pakeha Prejudice in New Zealand* (Heinemann, Auckland, 1986) at 154 as cited in Ross, above n 245, at 28.

The cumulative effect of these stories calcified racist stereotypes of the "Polynesian criminal" whose very presence "introduced a brown wedge into the cosy, homogenous, white society in which many European New Zealanders wished to believe."[254] Research undertaken by former police inspector James Morgan underscored these beliefs when he surveyed the stereotypes held by Auckland police officers about the Polynesian community.[255]

The survey found that police believed that Pacific peoples were three to seven times more likely to be criminal offenders than non-Polynesians when, in fact, we only accounted for four and a half per cent of a cross-section of all offenders in 1971.[256]

In her Master of Arts thesis, "New Zealand's 'Overstaying Islander': A Construct of the Ideology of 'Race' and Immigration", Tamara Brigid Ross argues that Morgan's survey, albeit a rudimentary one, "[illustrates] the potency of the negative characteristics that were being ascribed to Pacific islanders."[257] As a result, the criminal stereotype made us responsible for other socio-economic ills, including unemployment, housing, and economic inflation. As Mitchell contends:[258]

> This relationship was apparent in New Zealand of the 1970s where stereotypes of Pacific Islanders as having tendencies towards criminal behaviour, drunkenness, immorality, fecundity, disease and ghettoism strengthened popular perceptions of them as outsiders. This distinction, in turn, justified the desire of many to exclude them as immigrants and left Pacific Islanders vulnerable to scapegoating for a range of social and economic problems.

One of the first studies exploring the relationship between race, Pacific peoples and crime was LSW Duncan's paper "Racial Considerations in Polynesian Crime."[259] Duncan analysed the annual average convictions per 100 males of the Polynesian population (including Māori) between 1964–1968 to draw a correlation between race and crime.

The paper explored the relationships between Polynesians, the public, the media, and the police, as well as citing international scholarship about police and ethnic minority relations. In interpreting the data, Duncan drew three conclusions. First, a person's race or ethnicity does not predispose them to criminal offending.

Instead, one of the significant causal factors in the disproportionately high Polynesian crime rate was the "readiness of others to believe that racial characteristics identify a criminal category."[260] Second, there was a "strong possibility that, locally, Polynesians do not commit more crime than other sections of the community, but that a larger proportion of their crime is detected and acted upon."[261] Third, the mainstream media drove the "Polynesian crime" stereotype. The following headlines were cited to illustrate this point:[262]

255 "Bewildered young men who go wrong" *Auckland Star* (Auckland, 22 January 1976) as cited in Ross, above n 245, at 26.
256 Ross, above n 245, at 26.
257 At 26.
258 Mitchell, above n 252, at 147.
259 LSW Duncan "Racial considerations in Polynesian crime" in Graham Vaughan (ed) *Racial issues in New Zealand* (Akarana Press, Auckland, 1972).
260 At 32.
261 At 33.

A. "Island Child Gangs Steal for Families"
B. "Gangs of Island Children Pose Special Problems"
C. "Concern Felt at Maori Crime Rate"
D. "No Island child gangs now, but is it just the interim?"
E. "Racism is spurred by hate leaflets; Maori leaders and police in Auckland are worried over gang violence by teenage Maoris and Polynesians." [sic].

In the section "Polynesian crime and the Press", Duncan critiqued the emotive sensationalism prevalent in news headlines about Polynesian people who committed crimes, citing the lack of critical balance and efforts to "offset the adverse publicity … to counter the initial impact."[263]

Duncan proposed that all racial references be removed from crime reporting and that the positive achievements of Polynesians be emphasised to counterbalance the negative reportage.[264]

Furthermore, Duncan found a correlation between the surplus of media stories about "Polynesian crime" and its (potential) impact on police attitudes, noting that officers are exposed to the same mainstream news as the general public but with a heightened interest in crime and justice stories. Resultingly, Duncan contends that police will endeavour to appear responsive to the community's concerns, thereby legitimising their policing of certain ethnic groups:[265]

> The relationship between media and police is, therefore, reciprocal and reinforcing; increased racially-biased crime news may increase stereotypes held by the police, and their increased utilisation by the police would in turn provide more of the same news.

Duncan also explored the sociological arguments that crime/criminality are socially constructed and are "based on the cultural standards of that section of society which is able to assert politically its concepts of 'right' and 'wrong' over the remainder."[266] While Duncan did not explicitly define whom he meant by "that section of society", we infer that he was likely referring to those who are White, cis-gendered, heterosexual, upper-middle-class, land-owning and educated.[267]

Duncan concluded:[268]

> To an increasing extent, however, the high crime rate areas tend to be the inner-city areas, older suburbs whose physical deterioration makes them less attractive to their former populations and therefore more accessible to poorer, and sometimes near-destitute, immigrants.

262 These were a selection of many examples the author provided.
263 Duncan, above n 261, at 36.
264 At 37.
265 At 37.
266 At 37.
267 At 37.
268 At 38.

> A high crime rate is usually associated with the lower socio-economic, inner-city areas which are also likely to contain a substantial portion of racial minorities.

Duncan further argued that policing "is more often through a process of [identifying] persons [believed to be] violators."[269] He contended that the 'identifying' process relies on police locating "suspicious people" during patrols and "[inferring] moral character from [those people's] appearances."[270] In contemporary terms, this is referred to as racial profiling. Duncan drew on scholarship from the United States which found that police readily placed Black people in the "suspicious [criminal] category", inevitably tainting the Black community with the same "criminal" brush. These negative police encounters only furthered tensions between the police and ethnic minority communities, becoming emblematic of "authority and order but also the lawlessness and injustice of society in action."[271]

Duncan argued that this results in an erosion of trust and impartiality in police conduct, and it is a "small wonder that the disproportionate number of Polynesians appear in the court and penal institutions."[272]

Duncan also found, in sum:[273]

A. Police prefer to live outside of the area(s) they work in to reduce tensions created by their professional role, but consequently, their intrinsic understanding of the community's ways is reduced;
B. Police, as an institution, reinforce middle-class values, and thus, "police values tend to emphasise the difference between the legislating group and the minority groups";
C. Police tend to have high levels of prejudice and frequently perceive racial minorities in terms of adverse stereotypes; and
D. Police interaction with minority communities is frequently in a criminal context and "any prejudices and stereotypes are not likely to be contradicted by experience."

Notably, Duncan concluded that police are the justice system's gatekeepers, locating themselves at the "forefront of cultural and race relations in the move towards an integrated society",[274] and can, therefore, be agents for positive change in community race relations, policing, and crime control. These observations remain salient 50 years later as the first large-scale independent research inquiry into policing and unconscious bias is undertaken.[275] In summary, we argue that mainstream news media has continued to work with law enforcement to situate Pacific peoples within a racialised discourse that predisposes police and the public to associate us with crime.

269 At 38
270 At 38.
271 At 39.
272 At 40.
273 At 38.
274 At 38.
275 New Zealand Police "Independent panel and research team appointed for research on policing in our communities" (3 June 2021) <www.police.govt.nz>.

This phenomenon reflects the "separate process of deviancy amplification in which stereotypes and perceptions help stimulate policies and a self-fulfilling wave of unfairness."[276]

Ruptured Relationships (1970s)

> In its simplest form, the debate over Pacific Islanders and crime became one between a stereotype of an entire race as having a propensity for crime, or of them being the victims of stereotyping, scapegoating and media and justice systems that failed to accommodate non-European cultural values. In this way, the debate over "Pacific Island crime" can be linked with the struggle between cultural pluralist and assimilationist conceptions of the New Zealand nation.
> — James Mitchell[277]

Prior to 1972, New Zealand's immigration policy focussed on welcoming those who could best "assimilate" into society. In concrete terms, this meant prioritising White people from the United Kingdom, the United States, and parts of Europe. As James Mitchell explains in his doctoral thesis, "Immigration and National Identity in 1970s New Zealand", "while this [immigration] policy did not formally preclude the immigration of non-Europeans, the ability of individuals to assimilate were routinely judged according to their nationality and race."[278]

Mitchell argues that the "post-colonial" and decolonial international law movements made explicit policies of national and/or racial preference untenable and potentially "very damaging to New Zealand's international reputation."[279]

As a result, racism cloaked itself in facially 'equal' immigration policies that did not explicitly prioritise certain racial/ethnic groups. However, immigration officials retained full discretion in their selection process without disclosing the reasons for their decisions. According to policy documents of that time, the criteria for selection prioritised those "who we have been found by experience can be absorbed in New Zealand."[280] A person's race became the indicator of assimilability, "Othering" those who would (literally) discolour New Zealand's monocultural vision. To illustrate this point, consular instructions from 1971 stated:[281]

> Immigration [policies] are ... controlled and selective and constantly reviewed in light of conditions in New Zealand. They are also designed to maintain the distinctive pattern of our society resulting from the intermingling of European and Polynesian peoples and some smaller racial groups. (Emphasis added).

276 Moana Jackson, at 121.
277 Mitchell, above n 252, at 157.
278 At 74.
279 At 74.
280 At 76.
281 Department of Labour *Consular Instructions: Chapter 11 – Entry to New Zealand* (5 July 1971) at 2 as cited in Mitchell, above n 252, at 76 (footnotes omitted). In this statement, "Polynesian peoples" refers to Māori, not Pacific immigrants.

Under the Immigration Act 1920, persons of "British (or Irish) birth and wholly European origin" were exempt from obtaining a visa permit before coming to New Zealand, ostensibly allowing them free right of entry.[282] The fate of other, non-White people fell to the "absolute discretion" of the Minister of Immigration.[283] In our view, Pacific workers arriving on short-term visas occupied a liminal space in the social imagination. Not as 'real' settlers but as temporary placeholders plugging an economic imperative.

When Labour assumed power following the 1972 election, they intended to assert New Zealand as a nation independent of Mother England.[284] While this required a commitment to anti-discriminatory immigration policies and embracing cultural pluralism, there were few substantial changes to immigration law and policy. The only major shift was an end to the automatic right of entry for British and other peoples of "wholly-European origin", which Mitchell contends was due to "a desire to remove racial overtones in immigration criteria which were damaging to New Zealand's image in the international arena."[285] Nevertheless, immigration ministers maintained full discretion over all immigration decisions. We argue that, at most, these "changes" were superficial tinkers with no real drive to dismantle the immigration system's institutionally racist scaffolding. Despite allowing workers from Samoa, Fiji, and Tonga to come to New Zealand, the flow of our workers was tightly controlled, short-term, and labour driven. In exchange for contributing to the migrant's airfare, employers could retain passports and other identifying documents as a bond for their labour.[286] Our workers were siloed into a delimited fraction of the working class - an economic status still presenting today.

As a visible and geographically concentrated ethnic minority, our presence was considered as encroaching upon White New Zealand. The "alien" status ascribed to our people made it easier for media and politicians to brand us as "a threat, conveniently made [to be] redundant or deported."[287]

Furthermore, the racial construction of Pacific peoples as "Other" facilitated a politic of disposability, "normalising the idea that immigrants of colour may be lawfully disappeared by governmental authorities at any time."[288] By the end of the 1960s, our precarious political, economic, and social status made us vulnerable to the whims of the settler state. Lopesi expands on our exclusion from New Zealand's settler-colonial vision as something of a "social death":[289]

> Maintaining the colonial imaginary which is fixated on indigenous death means maintaining the social death of colonized peoples. Social death in relation to the extraction of labour refers to the way in which groups of people are excluded from full participation in a given society: relegated to death not physically but socially, unable to be fully human, unable to be self-sovereign. Under a capitalist system, when you have nothing to sell, you sell your ability to work. And while working-

282 Mitchell, above n 252, at 74–75.
283 At 75.
284 At 75.
285 At 88.
286 At 89; and Joris De Bres, Rob Campbell and Peter Harris *Migrant Labour in the Pacific* (Corso, Wellington, 1974).
287 Terrence Loomis *Pacific Migrant Labour, Class and Racism in New Zealand: Fresh Off the Boat* (Averbury, England, 1990).
288 Saito, above n 61, at 137.
289 Lopesi, above n 243, at 91–92 (footnotes omitted).

> class Pacific narratives are treasured within Pacific communities, they also point to a kind of assimilationist capture within a capitalist-colonial system. Colonisation, and settler-colonialism in particular, centres on Indigenous disappearance to be able to serve its own means of settling in a place. Their disappearance can occur in a myriad of ways, from death, to dislocation, to assimilation. When Indigenous peoples are forced to live under colonialism, the colonial imaginary requires their death through assimilation or death by assimilation.

It is important to emphasise that we were not the first non-White immigrant group to suffer this fate. One only needs to examine the racist treatment of 18th-century Chinese immigrants and the ensuing poll tax as demonstrative of White supremacy's embeddedness in New Zealand's immigration policies.[290]

The immigration sweeps in the early 1970s can be understood as both a physical expulsion of Pacific bodies as well as an ideological erasure of those of us who threatened White New Zealand's desire for monoculturalism.

In 1972, JA Jamieson published a chapter entitled "The Police and Ethnic Minorities" as part of a more comprehensive text exploring New Zealand's race relations.[291] Jamieson's core claim was that the relationship between police and ethnic minorities is critical to maintaining stable race relations.[292] In many respects, this was one of the earliest attempts to localise the relationship between police and ethnic minorities in New Zealand with reference to literature from the United States and the United Kingdom.

Jamieson resisted the oversimplification of good cop/bad cop, law-abiding/law-breaking binaries, offering a more nuanced examination of how state authorities interacted with the community. In 1971, Jamieson asked a sample of 100 Auckland police officers and a sample of 100 Pacific Islanders[293] whether police should treat Pacific peoples:

A. the same as other people; or
B. more leniently in view of their different cultural backgrounds; or
C. by very rigidly enforcing the law.

Notwithstanding the limited response options available to participants, most of each sample (police, 54 per cent, and Pacific Islanders, 88 per cent), considered that they should receive equal treatment to all others.

Only 33 per cent of police supported a more lenient approach, as did 12 per cent of Pacific peoples. However, 12 per cent qualified their choice with a time limit in that "[leniency] should only be for a short period until a new immigrant had availed himself of the opportunity to adapt to new laws and a different way of life."[294] Rigid enforcement of the law was not favoured amongst either group, garnering zero per cent support from Pacific peoples and three per cent from police. Jamieson concluded that "there is some misunderstanding by police members concerning the esteem in which they are held, particularly by Pacific Islanders," referencing Duncan Chappell and Paul Wilson's 1969 study of public attitudes towards the police, and vice versa.[295]

That study found that police generally take a pessimistic view of the public's estimation of them.[296] Eleven per cent of police considered Pacific Islanders as "particularly against or resentful toward Police" as well as a "particularly hostile group."[297] To test Chappell and Wilson's findings, Jamieson interviewed 100 Pacific Islanders[298] about their attitudes towards police based on four categories. He found that:

A. 76 per cent of respondents claimed to have great respect for police;
B. 22 per cent had mixed feelings;
C. 2 per cent had little respect; and
D. 0 per cent had resentment towards Police

Jamieson concluded that these results:[299]

> [C]ompletely contradict the Chappell and Wilson study who regarded Pacific Islanders generally as a hostile group. On the contrary, a slightly higher proportion expressed greater respect for the police than did a sample of the whole population in the Chappell and Wilson study.

Jamieson found that the police were unaware of the "true respect" in which most Pacific peoples held them at the time. On the contrary, when 100 police officers were asked to specify the attitudes they believed most Pacific peoples held towards them, only 8 per cent chose respect, 75 per cent chose mixed feelings, and 17 per cent chose little respect. None chose 'resentful'. Their most cited "problems" with Pacific peoples were:[300]

A. Language and communication difficulties mentioned by all police respondents;
B. Difficulty in understanding "Island culture and values";
C. Problems associated with alcoholism; and
D. Ancillary issues including our lack of education, impatience, cultural conflict, protection of family and friends, social adjustment issues, inability to assimilate into Western norms, inadequate supervision of children, and excessive shyness (especially with women).

Pacific respondents said that, when comparing police in Auckland/New Zealand to police in the islands, the critical difference was cultural competency. Jamieson concluded that Auckland police "compare favourably with their counterparts in the islands, except for their lack of knowledge of the people and their customs."[301]

290 See David Wong Hop *Reflections: of the poll tax on Chinese in New Zealand* (David Wong Hop, Auckland, 2017).
291 Jamieson, above n 147, at 43; and Stevan Eldred-Grigg and Zeng Dazheng *White Ghosts, Yellow Peril: China and New Zealand 1790–1950* (Otago University Press, Dunedin, 2014).
292 Jamieson, above n 147, at 44.
293 We are using the same terminology adopted by the author.
294 Jamieson, above n 147, at 45.
295 Duncan Chappell and Paul Wilson *The Police and Public in Australia and New Zealand* (University of Queensland Press, Queensland, 1969) at 103 as cited in Jamieson, above n 147, at 47.
296 Jamieson, above n 147, at 48.
297 At 47.
298 There was no further disaggregation of this data nor explanation of the sample size and survey methodology.

Jamieson's study suggests that the relationship between our communities and police was not necessarily as hostile as assumed. We hypothesise that significant generational differences might have impacted these findings. Notably, the finding about the "high respect" in which we held police is essential to unpack. There is something to be said about the deference older Pacific people afford authority figures, a philosophy that is not always shared by the younger generations. This is reflected in the following excerpt:[302]

> Older members of the Islander sample were almost unanimous in expressing their great respect for police. These people have been conditioned by an authoritarian background and have internalised the discipline of a rigid family authority structure. Similarly, young people who have recently arrived in New Zealand expressed no resentment for the police as an enforcement body. People under twenty-five years of age, especially those born in New Zealand, tended occasionally to express mixed feelings or little respect for the police.

Furthermore, Jamieson found that 95 per cent of police and 97 per cent of Pacific peoples "considered it desirable to recruit more Pacific Islanders into the police service in order to enable community building, improve public relations, and reduce criminal offending."[303] When the chapter was written, only 16 Māori and four Pacific police officers were stationed in Auckland.

INTRODUCTION OF THE POLICE TASK FORCE

While the dawn raids are often cited as the most fraught interaction between Pacific peoples and police, their blueprint was drafted in 1973 through the introduction of the pilot Police Task Force- a "highly-trained, tightly knit and mobile squad of policemen to attack violence and disorder on the streets."[304] In 1974, the Auckland Committee on Racism and Discrimination (ACORD) published a paper in fierce opposition to the Task Force.[305] ACORD asserted that the Task Force zealously "clamp down on Polynesian violence" and was exclusively interested in the "few inner city pubs and taxi ranks patronised almost exclusively by Maoris and other Polynesians."[306] ACORD members attended the Auckland Magistrate's court proceedings and found that 80 per cent of all Task Force arrests were for Māori and Polynesians. Eighty-five per cent of all arrests were deemed "trivial", often being for offensive behaviour, obscene language, disorderly conduct, obstructing arrest, and miscellaneous offending (undefined).[307]

The paper mapped the disproportionate policing responses to the purported "Polynesian [crime] problem", citing the 1973 pilot Task Force as a knee-jerk reaction to media hysteria surrounding "inner city street violence." ACORD levelled its criticism

299 Jamieson, above n 147, at 47.
300 At 48.
301 At 49.
302 At 47.
303 At 48.
304 ACORD "Auckland Task Force Must Be Stopped" (1975) 38 Salient.
305 Ross Galbreath and Oliver Sutherland "Task Force: An Exercise in Oppression" *Salient* (online ed, Wellington, 4 September 1974).
306 At 6.
307 At 6–7.

at politicians and the media working in partnership to justify the Task Force's existence. ACORD argued that the Task Force's agenda to "clean up the streets" was a euphemism for "cleaning Maoris and other Polynesians off the streets and into cells, innocent or not."[308] ACORD's concerns were confirmed by Police Inspector Dallow (Commander of the Task Force), who publicly conceded that:[309]

> The proportion of Maoris and other Polynesians became progressively greater each week. It is inconceivable that this racial group has suddenly become more prone to drunkenness, obscene language and offensive behaviour. The only conclusion to be drawn therefore, is that the Task Force is to an ever-increasing extent selectively arresting Maoris and other Polynesians.

Further:[310]

> It can be seen that the Task Force has *more than tripled* the arrests of Maoris and other Polynesians for drunkenness and *has more than doubled* the figure for offensive behaviour and obscene language. This is on top of regular police arrest figures which themselves are so high as to indicate bias [sic].

ACORD cited several cases of Māori and Pacific defendants who were unfairly arrested by the Task Force on legally dubious grounds, offering a holistic account of their personal, cultural, and familial circumstances. They concluded that the police are racist and used by racist politicians as tools of oppression.[311] The volume of arrests for such low-level offences was contrary to the Task Force's mandate to curb serious violence. In our view, the actions of the Task Force only served to heighten hostilities between Pacific peoples and police, further sowing the seeds of intergenerational distrust.

In 1974, ACORD published another short paper in response to six violent incidents in inner-city Auckland, four involving Polynesians. The paper critiqued the conservative political response by the Labour government who gained cross-parliamentary support to "control urban violence", citing the "inability of Pacific Islanders to handle [their] alcohol."[312] ACORD found that Pākehā committed the most violent crimes and had higher rates of alcoholism than Polynesians. Nevertheless, the media continued to stir anti-Polynesian sentiments through "inflammatory headlines and hysterical editorials calling for more Police with wider powers."[313] The renewed 1974 Task Force primarily focused their attention on Auckland's inner-city suburbs targeting "pubs, bus stops, taxi ranks and the streets."[314] ACORD argued that the Task Force's agenda was buoyed by the interests of the "affluent white community demanding intensive policing of the inner city", supported by ministers and police.

As a result, our inner-city Pacific community had "little to no control whatsoever over the policing of their community, even though it was they who were being arrested on

308 At 6.
309 At 7.
310 At 6.
311 At 6.
312 Oliver Sutherland *Community control of the police or police control of the community?* (ACORD, Auckland, 1974) at 1.

their streets."[315] The 1974 Task Force had an average of 60 arrests per week and allegedly maintained a consistent public presence, especially at night time. The Force received intense backlash, most notably with the firebombing of the Ponsonby police station, a People's Tribunal call for the Task Force to be disbanded, anti-police slogans appearing on walls and fences in the inner-city, and activist groups such as the Polynesian Panthers and Ngā Tamatoa taking direct defensive action against the police.

ACORD concluded that "this style of law enforcement is racist because it is perpetrated by the majority racial group selectively against racial minorities. And it is oppressive."[316] ACORD found that the relationship between Māori, Pacific peoples and the police was "rapidly deteriorating". Mainstream media played a critical role in entrenching racialised stereotypes about Polynesian crime, triggering reactionary policies that targeted Māori and Pacific urban communities. Although the Task Force's terms of reference never explicitly stated that they target specific racial/ethnic groups, the enforcement of their mandate demonstrated a clear racial bias that would only intensify under the dawn raids.

The Terror of the Dawn Raids (1974 to 1977)

The dawn raids are described as "the most blatantly racist attack on Pacific peoples by the New Zealand government in New Zealand history."[317] Despite being only one-third of all overstayers in the 1970s, we represented 86 per cent of all immigration prosecutions. By comparison, overstayers from the United States and the United Kingdom comprised 70 per cent of all overstayers but only five per cent of those prosecuted.[318] As the unemployment rate rose, thousands of us remained on expired work permits, with many of our employers simply turning a blind eye to our "overstayer" status.

A 1968 amendment to s 33(a) of the Immigration Act 1964 allowed the deportation of any persons who overstayed their work permits and empowered police and immigration officials to request visa documentation from any individual where there was "good cause to suspect" they had committed an offence under the Act.[319] Those unable to produce valid documentation could be arrested, kept in a holding cell without a warrant, and in some cases, deported back to their country of origin.[320] These requirements would prove problematic for many as travel agents or employers held their passports and immigration papers as a bond against repayment of borrowed airfares.

THE FIRST RAIDS

Following the short-lived and much-maligned police Task Forces, the Labour Government found themselves in a sticky spot: "On one hand, they made conciliatory remarks about the Pacific. On the other hand, they ordered a crackdown on overstayers."[321] The Immigration Division was hamstrung; there was no administrative appetite to review every visa card nor a willingness to halt or reduce visitor permits from the Pacific — a move that could open them up to claims of discriminatory treatment. Nevertheless, mainstream news media continued sensationalising headlines, blaming us for the urban crime wave.

In 1973, *The New Zealand Truth* published an article entitled "HOW TO BEAT CRIME", stating that "many Polynesians are charged too frequently with crimes involving violence and liquor" and proposed that we should be immediately deported if convicted of a crime.[322]

As Mitchell highlights:[323]

> Overstayers were most often detected when police stopped individuals in relation to other matters or when police and immigration officials raided homes on the basis of tip-offs from members of the public.

For example, the 1972 arrest of four Tongan overstayers at a processing plant in Mt Eden led to the discovery of 52 other Tongan workers of "indefinite" immigration status who were also employed at the plant.[324] By March 1974, New Zealand was feeling the ramifications of the first global oil shock — with hyperinflation and a looming economic recession:[325]

> ... fears of unemployment led to public resentment of the fast growing and very visible Pacific Island community and pressure on the authorities to act [to curb the 'overstayer' epidemic] grew.

Auckland Police chief superintendent AG Berriman publicly warned that "[a]nyone who speaks in a non-Kiwi accent or looks as though he was not born in this country should carry a passport."[326] On the evening of 13 March 1974, the Auckland branch of the Immigration Division instructed police and immigration officials to "dawn raid" several homes in Onehunga, all occupied by Tongan families. Police were instructed to "assist" the Division in locating suspected overstayers by entering homes (usually with two to six officers at a time) without warrants and accompanied by an immigration official.[327] With few restrictions on their heavy-handed tactics, police officers forcibly entered private homes, often with dogs, while families slept.

This controversial tactic was permissible as no law explicitly prohibited the raids. The raids were swift and merciless; when individuals could not produce their visa documents, they were hauled into police vans and put in cells.

313 At 1.
314 At 4.
315 At 4.
316 At 5.
317 Anae, above n 67, at 90.
318 Spoonley, above n 66, at 4.
319 Immigration Amendment Act 1968, s 5.
320 Section 5.
321 Keith Lynch "The dawn raids explained: What drove the Government to target Pasifika people" (1 August 2021) Stuff NZ <www.stuff.co.nz>.
322 "How to Beat Crime" *The New Zealand Truth* (9 January 1973) at 6 as cited in Mitchell, above n 252, at 152.
323 At 237.
324 At 238.
325 At 238.
326 Ross, above n 245, at 105.
327 Mitchell, above n 252, at 245.

Many were then made to appear in the Magistrates' court the next day "barefoot, in pyjamas or in clothing loaned to them in the cells."[328] Within five days, 31 Tongans were arrested from fewer than ten homes. Within a week, approximately 80 Pacific people were arrested and charged.[329] Alive to the diplomatic ramifications of letting the raids continue, Minister for Immigration Fraser Colman called for a halt to the raids, stating, "until we have a concerted plan, sporadic raids can only damage New Zealand's image at home and abroad."[330] Soon after, Prime Minister Norman Kirk introduced an amnesty for migrants to register their overstayer status and receive a two-month visa extension.

The Government had to contend that we comprised 60 to 80 per cent of the manufacturing workforce and, as Ross writes (citing Colman's statement in a *Tonga Chronicle* article):[331]

> The government had to face the fact that New Zealand industry was dependent on illegal Island labour. Unless they used such labour, production and export targets would not be met.

The opposition National Party seized on Labour's political "softness" and campaigned to "cut immigration to the bone."[332]

National successfully ousted Labour in the 1975 election and made good on their promise to slash the immigrant quota from 30,000 to 5,000.[333] The combination of hard-line executive policy and the overtly racist media caricatures of Pacific peoples reignited the terror of the Dawn Raids.

THE SECOND WAVE OF RAIDS

In 1975, public hostility towards our community intensified as the media doubled down on its coverage of Polynesian crime stories. The *New Zealand Truth* published the headline "THEY'RE TROUBLE" with a letter to the editor asking:[334]

> "how much longer have the long suffering people of New Zealand got to put up with the invasion of crime from the Pacific Islands?" and ... "there seems to be more and more Islanders becoming drunk and resorting to violence ... I strongly suggest we send all Islanders home and stop others from coming here."

Following that, *The Auckland Star* published "The Islanders" with the comment:[335]

> They are prepared to go to extremes to get here — fake health certificates, jump queues and break laws. Pregnant women hide the fact [of their pregnancy] to have New Zealand born kids in order to get deportation hindered or child support mailed to the islands.

328 At 239.
329 At 239.
330 Ross, above n 245, at 63–64.
331 *Tonga Chronicle* (28 April 1974) as cited in Ross, above n 245, at 54.
332 Ross, above n 245, at 75.
333 New Zealand History "The dawn raids causes, impacts and legacy" (15 September 2021) New Zealand History <nzhistory.govt.nz>.

National Minister Frank Gill defended the "visits" (raids), claiming "it was simply unfortunate but unavoidable that inquiries had to be made at times and places considered by some to be inconvenient."[336] As Ross argues:[337]

> [Pacific] immigrants took on the function of scapegoats for the deficiencies of a capitalist society, which was unable to provide adequate living conditions and to guarantee security to the whole of its working population. ...
>
> [They] were consequently more pliable, eager and exploitable as a workforce, and more prepared to undertake, dirty, tedious jobs in the area of low-paid (in New Zealand terms) unskilled labouring.

This account by Mrs Telesia Topping describes the raid on her family home in Onehunga:[338]

> At 6 o'clock we were all asleep except for one, who had to be at work at seven. He was making breakfast when he saw a policeman trying to push up the window. He was pointing towards the door. As the door opened, they burst inside. Four were inside, four more outside the house.
>
> A young policeman, about 22 years old, came into my room. I'd just opened my eyes because of the noise. I asked him what he was doing in my bedroom. He did not answer. I was really frightened. He went into the bathroom, inspected it came back and pulled the covers off my bed, looked under the bed. I called out to him again what he was doing in my bedroom. He ignored me.
>
> He pulled open the wardrobe, fiddled with the clothing, checked everything. The same policeman went into the adjoining room where my two nephews, aged 19 and 20 were asleep. [T]he policeman shone the light into their eyes, saying "get up and get out." Another policeman was also there. My nephews were very frightened. The police then started dragging them out to their van. One of them said they were taking us in because we were illegal immigrants and I told them we were not.

Mrs Topping's story is one of the few publicised accounts from those directly impacted by the raids and provides critical insight into what occurred. Condemnation from humanitarian and activist groups was swift, with the Tongan Society and Tongan Church organising a 3,000-person petition calling for an immediate amnesty for overstayers. There was some pushback from mainstream media, too. One newspaper accused police of deploying "gestapo tactics" and *The Auckland Star* — no stranger to publishing inflammatory stories about our community — remarked (albeit condescendingly):[339]

334 "THEY'RE TROUBLE" *The New Zealand Truth* (New Zealand, 8 July 1975) at 12 as cited in Mitchell, above n 252, at 152.
335 "The Islanders" *The Auckland Star* (Auckland, 1976) as cited in Mitchell, above n 252, at 154.
336 "Alternative Sought to Dawn Raids" *The New Zealand Herald* (25 February 1976) as cited in Ross, above n 245, at 96.

> Even illegal immigrants should not be subjected to this distress, but when the raids are the result of "information received" legitimate migrants are inevitably exposed to it. It adds unmercifully to the difficulties they are already encountering in getting accustomed to New Zealand life.

In 1968, the Immigration Division removed the racial classification criteria on its entry forms *except* in the case of Pacific peoples.[340] In 1975, a Senior Police Sergeant at a meeting with immigration officials said:[341]

> The number of Island men in New Zealand appears to outnumber Island women, and once liquor is taken [into account] quite an appreciable number of the men appear to be overcome by their sexual urges, resulting in them prowling around houses, apparently looking for women, indecent assaults or accosting women — usually of another race — waiting for buses and taxis.

This statement reifies the long-held racist stereotype of the lascivious Black/Brown man preying on innocent White women. These racist ideologies revealed themselves in the justice system, too. In the sentencing of a Tongan male offender for manslaughter, Speight J said:[342]

> "one must have the gravest anxiety as to the placement of these unsophisticated people in an environment which many of them are totally unfitted to cope with," and added that "the exposure to liquor was totally dangerous to a person of an unsophisticated background."

His Honour's statements were uncritically carried in all major newspapers, with one editorial urging Aucklanders to "listen to [this] 'highly respected member of society dealing in facts.'"[343] Anti-racist advocates claimed that Pacific peoples were being discriminated against by a legal system founded on settler-colonial ideologies that failed to accommodate Pacific values:[344]

> The white colonists of the last century believed that the English system was the highest form of justice and implemented it directly to New Zealand … We cannot claim that our courts offer justice to all manner of people if their atmosphere, their ways and their procedures are seen as alien, intimidating or unintelligible by members of minority cultural or racial groups … we have no right to demand that members of these groups should accept the forms, trappings and conventions of justice that we have copied from nineteenth-century England.

337 Ross, above n 245, at 32 (footnotes omitted) and 54.
338 "Dawn raids start again for illegal Tongan migrants" *The Auckland Star* (Auckland, 19 February 1976) as cited in Ross, above n 245, at 95.
339 *The Auckland Star* (20 February 1976) as cited in Mitchell, above n 252, at 244.
340 Ross, above n 245, at 51.
341 Mitchell, above n 252, at 156.
342 "Islanders in Trouble in New Zealand" *Pacific Islands Monthly* (December 1975) at 33 as cited in Mitchell, above n 252, at 152–153.

As the raids continued, it was recorded that the "vast majority of [tip-offs] were [from] Pacific Islanders", with Auckland immigration officials receiving over 1,500 written or verbal reports.[345] We found this interesting, although we could not locate any further information as to why the tip-offs predominantly came from other Pacific peoples. We recognise this is an essential point for further exploration that will only be illuminated through robust discussion with the families who lived through the Dawn Raids.

In 1976, the government introduced a register for overstayers to avoid prosecution. Over 90 per cent of the registrations were persons of Pacific descent.[346] Nevertheless, the amnesty was short-lived and by 1976 the raids were renewed. A Cabinet direction of 18 October 1976 ordered:[347]

> Police to take-over the pursuit of overstayers … [and] give priority to the apprehension of overstayers over other police duties and that there were to be "no limitations on [the] operation, Police [were] to do as they [saw] fit."

RANDOM STREET CHECKS

Alongside the dawn raids were the "random" police checks carried out on "suspected overstayers" often in broad daylight on public premises. Chief Superintendent Berriman told *The Auckland Star* that "the checks were completely at random" yet conceded "that almost all of those questioned were Polynesians."[348]

The checks were "justified" because the police would naturally make enquiries of those "we did not think [were] New Zealand born."[349] Random checks are not a novel policing process; however, during the 1970s, "random checks" intensified against our community. On the Labour Day weekend of 1976, Auckland police stopped and demanded the passports of 856 people — most of whom were Pacific. In addition to the "random" checks, 200 homes were also raided.[350] When Police Minister McCready was questioned as to why so many Pacific peoples were being interrogated, he responded, "if you have a herd of Jerseys and two Friesians, the Friesians stand out."[351] Chief Superintendent Berriman told media outlets that officers were instructed to "stop and question 'anyone who does not look like a New Zealander, or who speaks with a foreign accent." "These people," he declared, "must expect to arouse some suspicion.'"[352]

In our view, the loaded sub-text of who constitutes a "New Zealander" revolved solely around Whiteness, refuting any claims that the checks were made at "random."

By 1976, the total Pacific population was just over 79,000, with an estimated 3 per cent being illegal overstayers.[353] By then, the syllogising of "overstayer" with "Pacific Islander" situated us as "Other" to "real" New Zealanders.

343 *The New Zealand Herald* (Auckland, 13 September 1975) at 6 as cited in Mitchell, above n 252, at 153.
344 Oliver Sutherland *Equality of Opportunity, The Myth. Affirmative Action, the Answer* (ACORD, Auckland, 1977) at 1.
345 "The *Auckland Star* reported that there were 1,927 calls received about overstayers between August 1975 and April 1976 including 900 concerning Tongans, 367 concerning Fijians and 660 concerning Samoans." Mitchell, above n 252, at 245 and n 39.
346 At 247.
347 At 251.
348 At 255.
349 At 255.
350 At 254.
351 At 255.

Prime Minister Muldoon's contradictory statements only inflamed the situation: "that there have been — and there will be — no random checks on potential overstayers. No one will be stopped on the streets on suspicion of being an overstayer."[354] His denial of both the raids and random checks drew censure from activist groups and justice advocates, with the Auckland Trades Council calling for an amnesty in *The Auckland Star*.[355]

Nevertheless, *The New Zealand Herald* received more than 70 letters to the editor, 75 per cent favouring continuing the random checks. Furthermore, *The New Zealand Truth* magazine expressed support for the raids and random checks, claiming that it was simply an issue of law and order that left-wing activist groups had manipulated to make it a "race issue".[356] One letter to the editor read:[357]

> Since so many of these unwanted visitors have broken the law within a few months of their arrival, their suitability as candidates for permanent residency is questionable ... New Zealand doesn't want law breakers as citizens.

Chief Superintendent Berriman later doubled down on his comments that the police were not undertaking random checks, going as far to suggest that some officers may have "misunderstood" police instructions.[358] Individual officers publicly responded to Berriman's comments, saying that they were given "'clear instructions" to carry out random checks" on Pacific peoples. One even leaked an internal police memo that confirmed their tactics; "our orders were to grab anyone who looked like an overstayer.[359] We were told that Polynesians were an obvious target.'"[360]

The random checks led to an internal police inquiry which found that, of the 856 people questioned over the 1976 Labour Day weekend, a quarter of those had been at random.[361] The inquiry also found that the random checks (internally titled "Operation Pot Black") were poorly planned and executed, worsened by Cabinet's demands to see "immediate results."[362] The report also commented on the dubious tactics used by police and immigration officials in forcibly entering private dwellings at dawn:[363]

> The Immigration Act is administered by the Department of Labour. The Immigration Division Officers collate the information re. [the] probable location of the illegal immigrants. The Police act as chaperone on these enquiries. The Police use bluff to gain entry into the premises and to make searches for illegal immigrants. There is no power at law to authorise such course of action and they can only result in problems. Once a suspected illegal immigrant is located in a premises, because none of the immigration officers have a warrant, as required by their act, the police are then called upon to require the production of the person's passport, permit or other documentary evidence. If the enquiries establish that the person is an illegal immigrant, the immigration officer lays the information and then requests the constable to arrest him, as the immigration officer has no power of arrest. No police file is prepared and the Crown Solicitor acts as prosecutor on behalf of the Immigration Division.

352 At 254.
353 Statistics derived from the official estimate of overstayers of the Immigration Division based on the number who came forward in the amnesty and the accurate figures available from 1977 when immigration records were computerised. Immigration Division, „Polynesians in New Zealand" Aug. 1976, in NZNA BBAI 59d A. 251 DOL 22/1/76. Of the 79,000–60,000 were permanent residents or citizens, around 12,000 were in New Zealand on short term visas or under the continuing residency scheme for Samoans and a further 4,700 were granted temporary legal status through having signed the overstayer register.
354 *Sunday News* (24 October 1976) as cited in Mitchell, above n 252, at 256.
355 Mitchell, above n 252, at 262.
356 At 260.
357 At 260.
358 At 261.
359 Auckland Police Association "Police Action Regarding Illegal Immigrants" (press release, 25 October 1976) as cited in Mitchell, above n 252, at 262.
360 Mitchell, above n 252, at 263.
361 At 264.

In a 2021 television interview commemorating 50 years of the Polynesian Panther Party, Melani Anae told host Moana Maniapoto that the random checks inflicted as much trauma on the Pacific community as the raids themselves, with police strategically deploying Pacific police officers to target members of their community.[364] The National government formally ended the dawn raids in 1977. Nevertheless, the legacy of the dawn raids is still acutely felt by our community today.

APOLOGY FOR THE DAWN RAIDS

In 2020, the Polynesian Panther Party (PPP) submitted a letter to the Labour Government requesting a formal government apology for the Dawn Raids, education in all New Zealand schools about racism and discrimination, scholarships for Pacific learners, and a commitment to "truth-telling" about the raids.[365] The Minister for Pacific Peoples Aupito William Sio met with the PPP to discuss an appropriate course of action. Following a robust consultation, Cabinet approved a paper proposing an apology be given on 14 June 2021.

On 1 August 2021, Prime Minister Jacinda Ardern offered a formal apology at a highly publicised event in the Auckland Town Hall.[366] Hundreds attended, including families impacted by the raids, dignitaries, the PPP, young Pacific activists, Government officials and other community groups.

In her speech, Ardern expressed the Government's "sorrow, remorse, and regret that the dawn raids and random police checks occurred and that these actions were ever considered appropriate."[367] Ardern outlined several "gestures to accompany the apology", including support of educational scholarships, training courses, and support for the distribution of educational resources to schools.[368] The apology received much public comment and some criticism from Pacific academics and journalists. Dylan Asafo argues that the apology fails to acknowledge the "material and systemic impacts of the

362 At 235 and 264.
363 At 245–246 (emphasis added).
364 Interview with Melanie Anae, Associate Professor of Pacific Studies at the University of Auckland (Moana Maniapoto, Te Ao with Moana, Māori Television series, 22 June 2021).
365 Ministry for Pacific Peoples "Dawn Raids Apology" Ministry for Pacific Peoples <www.mpp.govt.nz>.
366 Jacinda Ardern, Prime Minister of New Zealand "Speech to Dawn Raids Apology" (Auckland Town Hall, 1 August 2021).
367 Ardern, above n 368.
368 Ardern, above n 368; and Jacinda Ardern and Aupito William Sio "Government offers formal apology for Dawn Raids" (press release, 1 August 2021).

dawn raids era" and that the gestures are a rushed response to the pressure to provide an apology rather than a genuine attempt to address "ongoing actions of racist violence."[369] Furthermore, The Spinoff editor Madeleine Chapman writes that the Dawn Raids History Community Fund is at best "a well-intentioned act of reconciliation" and at worst "yet another empty political gesture."[370] As a part of the fund, historical initiatives that support sharing stories from the dawn raids to educate future generations can receive up to $5,000. Chapman notes that applicants must fund the majority of these projects themselves and are not allowed to receive funding from anywhere else.

Chapman summarises the gesture as "throwing money (but only a little) at a wound and hoping it heals itself."[371] While a handful of testimonies about the raids are scattered throughout the public domain (such as that by Mrs Telesia Topping), there has been no full, frank, and independent inquiry to allow survivors an opportunity to record their testimonies. We contend that this would have been an appropriate and necessary first step to facilitate collective healing, reconciliation, and accountability for this act of state-sanctioned racist violence.

Contemporary Issues Between Pacific Peoples and Police

In the 50 years since the Dawn Raids, there has been a concerted effort by police to foster better relations with our communities. Despite their good intentions, we are still disproportionately arrested, charged, and prosecuted compared to Pākehā and other ethnic minority groups (except for Māori). We are also significantly more likely to be subject to police violence than Pākehā, with ourselves and Māori making up two-thirds of those shot and killed by police.[372]

STOP-AND-SEARCH PRACTICES

Police stop-and-search practices are one of the main drivers of exacerbated tensions between police and ethnic minorities. To date, no research has qualitatively explored police stop-and-search practices in Aotearoa New Zealand.

This research gap was identified over a decade ago in the Ministry of Justice report *Identifying and Responding to Bias in the Criminal Justice system*.[373] Furthermore, police do not publish their data on stop-and-search practices, thereby hindering our analysis.[374] In 2020, the Stuff NZ investigative reporting team published "Unwarranted: The little-known, but widely used police tactic" of unwarranted stops and searches.[375] The investigation identified that in over 12 months, the police made 9,435 warrantless searches predominantly targeting Māori and Pacific peoples.[376]

369 Dylan Asafo "Empty gestures" (15 August 2021) E-Tangata <https://e-tangata.co.nz>.
370 Madeleine Chapman "How much dawn raid history can the government buy with $5,000?" (16 November 2021) The Spinoff <https://thespinoff.co.nz>.
371 Chapman, above n 372.
372 Michael Neilson "Armed Response Teams trial: Police warned not consulting Māori could have 'severe' consequence" *The New Zealand Herald* (online ed, Auckland, 29 May 2020).
373 Morrison, above n 226, at 36.
374 At 36.
375 Eugene Bingham, Felippe Rodrigues and Chris McKeen "Unwarranted: The little-known, but widely-used police tactic" (December 2020) Stuff NZ <https://interactives.stuff.co.nz>.

It also identified a rise in these unwarranted stop-and-search procedures even when they resulted in no charges being laid. Importantly, we were 1.2 times more likely to be targeted for these searches in comparison to Pākehā.[377] Furthermore, the report identified the likelihood of different ethnicities being stopped and searched across different regions based on data from the relevant police stations. Four of the top ten stations for searches were in Auckland: Henderson, Manurewa, Ōtāhuhu and Mount Wellington.[378] In Auckland Central, we were 5.37 times more likely to be involved in an unwarranted search than Pākehā.[379]

Considering that many of us live in South and West Auckland, it is unsurprising that these stations feature in the top searches. Concerningly, the report noted a sharp increase in searches where police had not recorded the station which the officer came from.[380]

In our view, the investigation raises serious questions about transparency in police reporting and invites critical discussion about the scope of warrantless search powers. The difficulty in accessing relevant police data contributes to the paucity of research in this area. Moreover, Police Commissioner Andrew Coster revealed that police have only been able to analyse ethnicity data since March 2019.[381] This indicates that future research might emerge in the coming years.

DIVERSION

Police discretion and diversion is a process that can disadvantage racial/ethnic minorities in the justice system. There are two major diversion schemes in Aotearoa New Zealand: the adult diversion scheme, which is an extension of the discretion not to prosecute; and the youth justice system.[382] The decision not to prosecute is controlled by police prosecutors, youth aid officers, and diversion officers. Ultimately, these roles are influenced by wider the "police culture" which may include an officer's subjective perceptions and/or generalisations about an offender. While these influences are difficult to quantify, research (albeit limited) has shown that ethnic-minority defendants are less likely to be given the option of police diversion compared to their ethnic-majority counterparts.[383] Research has reported police frustration at the "revolving" nature of diversion practices and frustration with diversion as "soft options."[384] Pacific peoples and Māori are particularly overrepresented in the youth jurisdiction and under-referred to restorative justice programmes.[385]

The indifference towards diversion practices combined with an identified bias against racialised persons can result in the over-criminalisation of Māori, Pacific and other non-White groups. In our view, police discretion around diversion represents an area where police bias negatively impacts our engagement with the justice system.

376 Bingham, Rodrigues and McKeen, above n 377.
377 Bingham, Rodrigues and McKeen, above n 377.
378 Bingham, Rodrigues and McKeen, above n 377.
379 Bingham, Rodrigues and McKeen, above n 377.
380 Bingham, Rodrigues and McKeen, above n 377.
381 Bingham, Rodrigues and McKeen, above n 377.
382 Alex Latu and Albany Lucas "Discretion in the New Zealand Criminal Justice system: The Position of Maori and Pacific Islanders" (2008) 12 Journal of South Pacific Law 84 at 86.
383 Morrison, above n 226, at 41.
384 Latu and Lucas, above n 384, at 87.

Armed Response Team Trial

In October 2019, police rolled out a trial of Armed Response Teams (ARTs) in response to concerns about police and community safety following a rise in firearms-related incidents and to enhance police capabilities following the 2019 Christchurch Mosque terrorist attack.

> The six month trial across Waikato, Manukau and Canterbury was intended as a new means of deploying the Armed Offenders Squad ("AOS") in specialist vehicles with more tactical options than usual police patrols.[386]

These districts were chosen based on police data relating to firearms confiscations and Armed Offender Squad support.[387] The lack of public consultation, the trial's rushed implementation, and the choice of location drew strong criticism from Māori and Pacific communities. Dean of AUT Law School Associate Professor Khylee Quince and content consultant Karen Bieleski describe the ARTs as a "public relations disaster" and a significant shift from the "policing by consent" model developed in 19th-century Britain.[388]

The inclusion of Counties Manukau was of particular concern to our people as this area has the highest number of Pacific residents, meaning we would be disproportionately affected by any ART incidents. As Quince and Bieleski describe, "the deployment of quasi-militaristic vehicles was also viewed as a deliberate scaling up of policing, to blur the lines between police and the military."[389] Prior to the rollout, researchers informed police of the negative impacts the ARTs would have on the community, stating that they "could further compound already strained relationships with Māori and Pacifica communities."[390] Polling by independent campaigning organisation Action Station Aotearoa showed 87 per cent of Māori and Pacific peoples felt less safe in the presence of ARTs, and 91 per cent said they would be less likely to call on armed police in an emergency.[391] Justice advocates Tā Kim Workman and Julia Whaipooti filed an urgent claim with the Waitangi Tribunal, citing the lack of consultation as a breach of Te Tiriti and calling for the trial to be immediately halted.[392] This led to a nationwide "Arms Down NZ" movement that successfully gained tens of thousands of signatures in its petition calling for the trial to be scrapped.[393] In April 2020, Police Commissioner Andrew Coster responded to the criticism and abolished the trial after six months.[394]

385 At 89.
386 Karen Bieleski and Khylee Quince *Police Ten 7 Review: Independent Report Commissioned by TVNZ and Screentime* (September 2021) at 14.
387 New Zealand Police "Armed Response Team trial" <www.police.govt.nz>.
388 Bieleski and Quince, above n 388, at 14.
389 At 15.
390 Neilson, above n 374.
391 Emilie Rākete "Māori and Pacific dread armed police patrols" (9 June 2020) University of Auckland <www.auckland.ac.nz>.
392 Māni Dunlop "Māori Justice Advocates want Police Armed Response Teams stopped immediately" (17 March 2020) Radio NZ <www.rnz.co.nz>.
393 Arms Down NZ "Disarm, Defund and Disband the Police!" Arms Down NZ <armsdown.nz>.
394 Vita Molyneux and Alice Wilkins "Police commissioner confirms no more Armed Response Teams in New Zealand" (09 June 2020) Newshub NZ <newshub.co.nz>.
395 Michael Neilson "Police Use of Force Report: Māori seven times more likely than Pākehā to be on the receiving end" *NZ Herald* (online ed, New Zealand, 27 August 2020).

Police record their use of tactical options through the *Tactical Options Research Report*. A 2017 *New Zealand Herald* investigation into the tactical deployment of force found that police predominantly deploy force on Māori and Pacific peoples more than on Pākehā.[395] For Pacific peoples, this was at a rate of 3-1.

The 2018 *Tactical Options Research Report* revealed that we were overrepresented at Tactical Options Research (TOR) events.[396] TOR events for us in 2019 were 135 per 100,000 compared to 47 per 100,000 for Pākehā.[397] In 2019, TOR events for Māori and Pacific peoples had a lower rate of empty hand techniques used and a higher usage rate of OC (oleoresin capsicum) spray.[398] The 2018 report also found that ourselves and Māori were more likely to experience a TASER deployment than subjects of other ethnicities.[399] This indicates a police inclination to use force and more serious forms of force with our people in comparison to Pākehā.

How the police deploy force on citizens is an increasing concern, particularly in light of the brutality inflicted on Black, Brown, and Indigenous peoples in other settler colonies such as Australia, the United States and Canada. The police have the mandate to use force despite the published data revealing a clear bias in the use of that force on racial minorities.

The Tactical Options Research Reports reveal that the police appear to be in denial about their use of force on us.[400] The report apportions blame on certain groups' disproportionately high level of contact with the justice system as the reason for their involvement in a disproportionately higher proportion of TOR events.[401] On 22 September 2021, Police Commissioner Andrew Coster announced that the government would invest $45 million to fund improvements to the Armed Offenders Squad, including tactical teams, frontline training, intelligence analysis and extra staff.[402] Coster assured the public that the Tactical Response Model (TRM) "represents no change at all to police's arming policy" and "would not target Māori and Pacifica communities."[403] The focus was on high-end, organised crime and prolific high-risk offenders. That same day, prison abolitionist group People Against Prisons Aotearoa (PAPA) issued a statement outlining their concerns for the TRM.[404] PAPA spokesperson Jean Su'a criticised the lack of information in the announcement as a deliberate move by police to avoid public scrutiny, commenting:[405]

> We need to know now if this will end up with more cops on the street with guns. Poor, Māori and Pacific communities know that cops with guns are a threat to our lives. More cops with guns means more dead brown kids.

396 New Zealand Police *Tactical Options Research Report 2018* (Report #7, 1 January to 31 December 2018) at 7.
397 New Zealand Police *Tactical Options: 2019 Annual Report* (Report #8, 1 January to 31 December 2019) at 44.
398 At 44.
399 New Zealand Police, above n 398, at 7.
400 New Zealand Police, above n 399, at 42.
401 At 42.
402 "Tactical response model no change to policing status quo – Coster" (23 September 2021) RNZ <www.rnz.co.nz>.
403 "Tactical response model no change to policing status quo – Coster", above n 404.
404 People Against Prisons Aotearoa "PAPA Statement On Tactical Response Model" (22 September 2021) Scoop <www.scoop.co.nz>.

PAPA likened the TRM to "American-style policing by stealth", arguing that "[i]ncreasing the presence of armed police will only escalate the climate of violence within our communities, and for the police."[406]

Ultimately, PAPA demanded that police disclose details of the model so communities were aware of how armed cops might be present in their neighbourhoods. At the time of writing, various iterations of the Tactical Response Model(s) were still underway.

PHOTOGRAPHING MĀORI AND PACIFIC YOUTH

A recent Radio New Zealand (RNZ) investigation revealed that police have been using an app to photograph Māori and Pacific youth with the images submitted as "intel notings" to the central database.[407] Although it was initially reported that only Māori youth were targeted, an anonymous police officer revealed to RNZ that he witnessed Pacific youth also being stopped and photographed by officers whilst Pākehā youth were left alone.[408] When RNZ asked for the ethnic breakdown of youth intel notings, the police could not provide that information. Furthermore, they did not disclose whether their facial recognition system was used on the images of youths they collected for intelligence.[409]

Indigenous data specialist Karaitiana Taiuru argues that police were using facial recognition technology to profile young, brown faces.[410] Moreover, Camille Nakhid contends that the photographing of innocent Māori and youth of colour conflicts with Police Commissioner Andrew Coster's comments that New Zealand Police "police by consent."[411]

Nakhid also posits that this conduct is intimidation on the part of the police and reflects an institutionally ingrained belief that young people of colour are more likely to be criminals.[412] At the time of writing, a joint inquiry by the Independent Police Conduct Authority and the Privacy Commissioner into police conduct when photographing members of the public was underway.

POLICE TEN 7

Police Ten 7 is a reality television show created by Ross Jennings as an update of the 1990s local series Crimewatch. The show profiles offenders at large and asks the public (viewers) to help the police search for them. The show also follows officers on their patrols and other activities while on duty. The show first aired on TVNZ 2 in 2002 with host Graham Bell (a retired Detective Inspector) and is currently in its 28th season. On 21 March 2021, Auckland City Councillor and Samoan community leader Fa'anana Efeso Collins tweeted:

> Hey @TVNZ it's time u dropped Police Ten 7. A couple of days ago I was watching tv & your ad cut promo'ing the program showed young brown ppl. This stuff is low level chewing gum tv that feeds on racial stereotypes & it's time u acted as a responsible broadcaster & cut it.

405 People Against Prisons Aotearoa, above n 406.
406 People Against Prisons Aotearoa, above n 406.
407 Te Aniwa Hurihanganui "Police using app to photograph innocent youth: 'It's so wrong'" (26 March 2021) RNZ <www.rnz.co.nz>
408 Hurihanganui, above n 409.
409 Hurihanganui, above n 409.
410 Hurihanganui, above n 409.

The tweet received nearly 1,500 'likes' and over 100 comments gaining considerable media attention. In an interview with RNZ, Collins argued that the show fed on racist stereotypes "particularly of young brown men being brutish."[413]

Race Relations Commissioner Meng Foon also criticised the show for targeting "more brown people than white people so therefore it is racist."[414] Foon proposed that the show could "proportionalise the filming of brown people."[415] Former Police detective Tim McKinnel called the show "a polished piece of state-sanctioned propaganda" that exacerbated "the racism and classism that has harmed our vulnerable communities for too long."[416] Graham Bell responded to the criticism that the show perpetuates racist stereotypes by saying, "it's very difficult not to develop a slight attitude to a group of people that are constantly offending."[417] In response to these criticisms, TVNZ and Screentime commissioned an independent report into the show reviewed by Khylee Quince and Karen Bieleski.[418]

The report's terms of reference were:[419]

1. Whether the Programme or the promotion of the Programme fairly portrays Māori, Pasifika, and all ethnic groups;
2. Whether the production of the Programme or its promotion is consistent with contemporary values in NZ society in 2021; and
3. Whether there are any recommendations that would assist TVNZ and Screentime regarding the future production and promotion of the Programme.

The reviewers discuss the show's early years (2002–2014), describing Bell as taking a "hard-line tough-on-crime on-screen persona, representing old school policing and a binary police versus criminals, goodies versus baddies dynamic."[420] Reference was made to Bell's provocative statements about suspects referring to them as "vicious morons", "gutless goons", and "lunatic scumbags."[421]

In 2014, the show was overhauled in a "deliberate attempt to take it in a new direction from its roots associated with Graham Bell and the police culture of its time."[422] Tongan officer Rob Lemoto was successful in securing the host role. The report states:[423]

411 Auckland University of Technology "Police Surveillance Of Young People Of Colour Needs To Stop" (9 March 2021) Scoop Regional <www.scoop.co.nz>.
412 Auckland University of Technology, above n 413.
413 "Police Ten 7 show 'feeds racial stereotypes' — Auckland councillor" (21 March 2021) RNZ <www.rnz.co.nz>.
414 "Police Association calls for Race Relations Commissioner to retract 'racist' comment" *The New Zealand Herald* (online ed, Auckland, 22 March 2021).
415 "Police Association calls for Race Relations Commissioner to retract 'racist' comment", above n 416.
416 Tim McKinnel "Police Ten 7 fly-on-the-wall reality or propaganda? These documents make it clear" (24 March 2021) The Spinoff <https://thespinoff.co.nz>.
417 McKinnel, above n 418.
418 Bieleski and Quince, above n 388.
419 At 3.
420 At 7.
421 At 7.
422 At 7.
423 At 7–8.

> Hiring Rob Lemoto, a working officer of Tongan descent from South Auckland, was key to the show's new direction. So too was a new focus on victims of crime, less intrusive framing and a shift away from inflammatory language — particularly in reference to offenders and offending. Shows now often revisit offences, to show how matters are resolved — to close the loop from an initial encounter to eventual outcomes.
>
> The new tone of the show included a concern for [and] respect for, te reo Māori — with Lemoto taking Level 1 and 2 courses to work on his pronunciation. Alongside a change in the presentation of the show, the diversity of police representation has also changed in recent years — with a deliberate play to show police of all ages, ethnicities, genders and rank.

In discussing the strained relationship between police and Māori, the reviewers also note:[424]

> Many Pacific peoples exhibit similar mistrust of the police — stemming from both historical and contemporary experiences. The recent Government apology for the Dawn Raids highlights the long-lasting impact of discriminatory police practice against Pasifika peoples — nearly 50 years later.

In response to the terms of reference, the reviewers conclude that while Māori and Pacific peoples frequently feature on the show, their portrayal was fair on balance.

It is not enough to trigger standard 6 of the Broadcasting Standards Authority regarding discrimination or denigration against particular populations, which requires an element of malice or nastiness.[425] Notwithstanding the above, the reviewers add:[426]

> [This] is not to say that the show does not contribute to negative stereotypes of these groups. It also does not diminish the hurt, anger and frustration felt by Māori, Pasifika and other peoples who feel that the on-screen portrayal of them perpetuates such perception.

Moreover, :[427]

> At the level of individual encounter, the filters that operate to control what is portrayed on Police Ten 7 are usually unproblematic. However, the repeated portrayal and positioning of individuals who identify with or are presumed to belong to certain groups as offenders or suspects is in and of itself a matter of concern — for its relationship to perpetuating unhelpful stereotypes, and to the potential Pygmalion effect.

424 At 16.
425 At 17.
426 At 17.
427 At 18.

> The Pygmalion effect is a phenomenon in psychology and behavioural science that describes how expectations can modify behaviour. This can operate in positive and negative ways — so that others' beliefs about us impact how we behave, or provide motivation for living up to those expectations. This is similar to "labelling theory" in criminology — which suggests that labelling people or behaviours affects whether we are attracted to or resist the behaviour. This is a double-edged sword in the criminal justice context. While presenting Māori and Pacific peoples as fitting within the group likely to be offenders may on the one hand be stigmatizing and exclusionary, it can also ironically encourage subcultures of disrespect for authority. The show does not create these dynamics, but it does little to discourage them.

Ultimately, the report recommends that TVNZ formalise its cultural integrity policies and undertake relevant training into racism, bias, and Te Tiriti.[428] They also recommend that the show broaden its regional and demographic coverage, include more planned events with police presence to provide better geographic representation, ensure all promos be overseen and signed off for editorial content by TVNZ's Commissioner and that when the show's content or promotional material is deemed problematic, that it be substituted with generic material until a suitable replacement is sourced.[429]

In our view, the current discourse around Police Ten 7 is an opportune moment to critically consider how 'Copaganda' — the phenomenon in which news media and other social institutions promote celebratory portrayals of police officers with the intent of swaying public opinion for the benefit of police departments and law enforcement — exists within Aotearoa New Zealand's film and television landscape.[430] While beyond the scope of this report, there is a noted absence of literature on this topic, making further research endeavours both urgent and necessary.

PACIFIC PEOPLES IN THE POLICE FORCE

In 2018, the police set a three-year target to reflect the percentage of ethnic minority groups in its staff relative to their population size. As of then, we were only 6.6 per cent of the total police force.[431] The Police National Strategic Pacific Advisor stated that the aim of having Māori and Pacific officers in the organisation was to change the prison population statistics and stop offenders from entering the justice system.[432]

Over the last decade, police have developed a specialist unit of Indigenous and ethnic officers to assist in building relationships with Indigenous and ethnic communities. Cultural Liaison Officers were developed as a part of this initial strategy to proactively encourage community policing, reduce those communities' fears of being police targets and increase their confidence in police.[433]

428 At 19.
429 At 19–20.
430 See Brenden Gallagher "Just say no to viral 'copaganda' videos" Daily Dot (28 February 2020) <dailydot.com>.
431 Charlotte Carter "Police facing uphill battle in attempt to recruit ethnic minorities and women" (15 September 2018) Stuff NZ <www.stuff.co.nz>.
432 Moala, above n 20.
433 Garth den Heyer "New Zealand Police Cultural Liaison Officers: Their Role in Prevention and Community Policing" in James F Albrecht, Garth den Heyer and Perry Stanislas (eds) *Policing and Minority Communities: Contemporary Issues and Global Perspectives* (Springer, Cham (Switzerland), 2019) 235 at 236.

Research into the role of Cultural Liaison Officers, though scant, reveals that officers felt that they were making progress in establishing meaningful relationships with ethnic communities.[434]

Despite this impression of success, concerns have been raised with respect to these roles. Isabelle Bartkowiak-Théron and Nicole Asquith argue that by requiring these specialist officers to act as mediators in already fraught relationships between police and their respective communities, mediators are put into a potentially conflicting position.[435] However, a Samoan sergeant who went viral on social media after sharing his experience of praying with a young girl during a suicide call-out says:[436]

> I'm hoping that we will be able to have that view of our Pacific values and culture and hopefully prevent revictimisation and reoffending within our Pacific peoples. It [Cultural Liaison officers] will definitely make a difference."

In our view, whether having more 'Brown officers' tangibly results in 'better' policing practices and reduced offending by our people requires critical attention. A scan of the data mentioned above shows that an increase in Pacific police officers has not resolved our people being arrested, charged, prosecuted, convicted, and sentenced at disproportionately higher rates. We contend that any discussion of diversity and representation must also call into question the existence of institutional racism within the police force, too.

POLICE PACIFIC STRATEGY O LE TAEAO FOU – DAWN OF A NEW DAY (2018)

In 2015, then Police Commissioner Mike Bush worked with our communities to establish the National Pacific Advisory Forum. This forum developed into O Le Taeao Fou — the Pacific National Strategy that attempts to develop a Pacific-led approach for communities in New Zealand.[437] The major aims of the strategy were to prevent us from offending and victimisation and prevent our youth from entering the criminal justice system.[438] The strategy was intended to lay the groundwork for 2018–2020. The initiatives in the action plan include:[439]

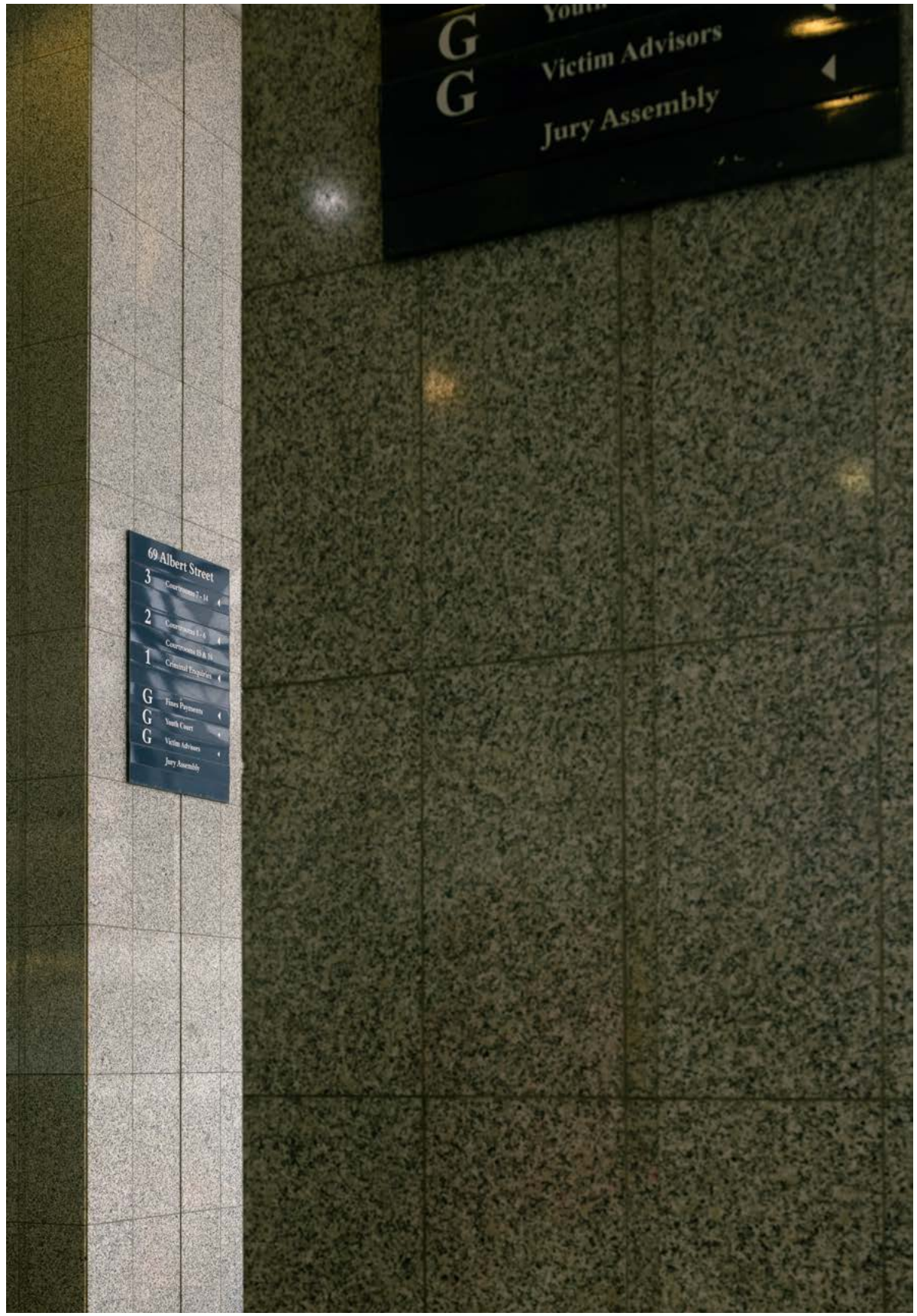
A. Working with the Commissioner's National Pacific Advisory Forum
B. Creating and sharing relevant programmes within the districts
C. Developing and implementing evidence-based policing through robust data gathering that included the use of Pasifika research methodologies to inform policy and practice
D. Working with Pacific Advisory Groups and local Pasifika communities
E. Considering alternative resolutions to prosecution and ensuring wrap-around services are provided
F. Drawing on Pasifika principles of engagement to identify and address underlying causes of behaviour.

434 At 248.
435 Isabelle Bartkowiak-Théron and Nicole L Asquith "Policing Diversity and Vulnerability in the Post-Macpherson Era: Unintended Consequences and Missed Opportunities" (2014) 9 Policing: A Journal of Policy and Practice 89.
436 Moala, above n 20.
437 New Zealand Police *O Le Taeao Fou: Dawn of New Day* (November 2018) at 4.

Following the implementation of O Le Taeao Fou, Avondale Area Commander Inspector Grant Tetzlaff created the Tautua Prevention team.[440]

The team works with Pacific community organisations to build effective partnerships to prevent offending and victimisation. Despite an array of focus areas being identified in the strategy and a commitment to monitoring and reporting, there has been no revisitation of the strategy and evidence that its action plan has succeeded.

438 At 32.
439 At 32.
440 Ministry for Pacific Peoples "Incorporating Pacific values to create change" (28 Feb 2021) <www.mpp.govt.nz>.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ON THE 7th DAY OF APRIL 1986
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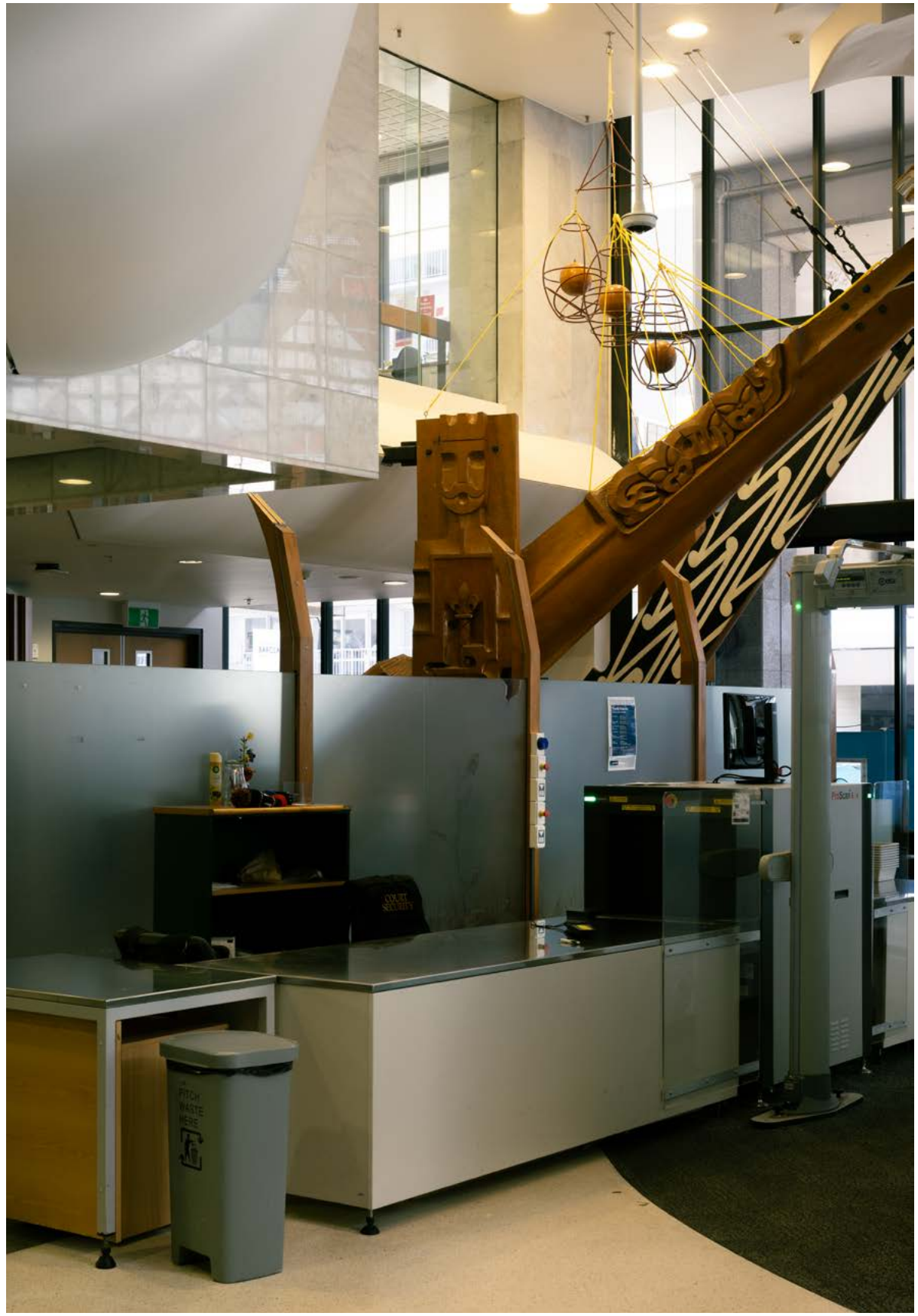
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(In)Access to Justice

This section considers the critical stages of the justice process after a charge has been formally laid. An extensive body of literature — locally and internationally — explores specific justice processes such as bail, jury selection, trial, guilty pleas, sentencing and so on. It is beyond this report's scope to robustly explore every aspect of the justice process, and we, instead, focus on the literature relevant to our people. A snapshot of Ministry of Justice data for 2021 shows that we were:[441]

A. 11 per cent of those granted bail;
B. 13 per cent of those granted electronically monitored (EM) bail;
C. 10 per cent of those remanded in prison on bail;
D. 12 per cent of those discharged without conviction;
E. 10 per cent of those deemed unfit to stand trial;
F. 13 per cent of those found not guilty by reason of insanity;
G. 8 per cent of those granted name suppression; and
H. 12 per cent of those given a Stage 1 warning for a three-strikes offence, and 21 per cent of those given a Stage 2 warning.

Aside from those granted name suppression, the numbers show that we are overrepresented, albeit to a moderate degree, across all specific justice processes. The absence of relevant research on issues (d)-(h) means we cannot comment specifically on those topics.

Access to Legal Representation

Under s 23(b) of the New Zealand Bill of Rights Act 1990, anyone who is arrested or detained has the right to consult and to instruct a lawyer without delay. While all persons have this inalienable right, finding and retaining legal counsel can be difficult, especially for those experiencing economic hardship. While there is no set fee for criminal lawyers, the average charge-out rate for a criminal defence lawyer can fall between $200 to $500 per hour.[442] It is well established that we sit at the bottom of all socio-economic indices. As of 2018, our median household income was $24,300 (equal to Māori), the lowest of all ethnic groups.[443] Our average household income was $31, 800; $76, 851 less than the average annual household income.[444] In 2018, Statistics New Zealand found that our median wealth (assets owned minus debts and liabilities) was $15,000 compared to $138,000 for Pākehā.[445] Moreover, our women have the lowest personal income across all ethnic groups, earning 25.1 per cent less than Pākehā men.[446]

Moreover, a person's education, ability, age, gender identity, sexuality, location, and immigration status are important intersectional factors when considering if and how they access quality legal representation.

441 Ministry of Justice *Just Statistics data tables: Notes and trends for 2021/2022* (Ministry of Justice, 2021).
442 Thomson "How Much Does A Lawyer Cost NZ?" (15 January 2021) Employment Lawyers Auckland <www.employmentlawyersauckland.com>. Fees differ depending on experience, PQE and PAL level.
443 Ministry for Pacific Peoples, above n 32, at 51.
444 At 50.
445 Pete McKenzie "New Zealand's perverse ethnic wealth gap" (27 July 2020) Newsroom <www.newsroom.co.nz>.
446 Pacific Pay Gap Inquiry *Voices of Pacific Peoples: Eliminating pay gaps (*Human Rights Commission, October 2022) at 10.

There is scant quantitative and qualitative research exploring our experiences of accessing legal representation. Ida Malosi (as her Honour then was) and Sandra Alofivae's 1996 *Report on Consultation with Pacific Islands Women* provides the most comprehensive discussion of our experiences with access to justice, despite only surveying a sample of 60 Pacific women in Auckland.[447] Their consultation highlighted that many of the issues identified in the Law Commission's (NZLC) large-scale research into *Women's Access to Legal Services* were equally applicable to Pacific women.[448] Malosi and Alofivae's consultation considered the findings from the NZLC's research and assessed them against the needs and experiences of Pacific women. Their concerns, prioritised by importance, were: communication, choice, control, credibility, cost, confidence, conditioning, culture, connectedness, community, and caregiving.[449]

In terms of communication, the report noted that there were issues for our women in accessing information about the law and that "lawyer speak" was difficult for women whose first language was not English.[450] In terms of choice, the report found that "almost without exception women did not know that they had the right to choose their own lawyers."[451] All participants noted that they felt that other people, particularly lawyers, controlled their access to the legal system.[452]

In terms of credibility, participants said that they felt like they had no standing in the system because they were Pacific and that only a traditional European perspective was valued.[453] Many issues came back to the cost of legal services and that most women were unable to afford the standard legal aid contribution of $50.00.[454] Participants said that they were turning to other forms of representation, such as their church ministers, due to the high fees and unsatisfactory experiences with lawyers.[455] Furthermore, many said that they did not know that legal aid was available in their case.[456] Malosi and Alofivae also identified the need for interpreter costs to be included in the legal aid application.[457] Participants also said that they lacked confidence in themselves when it came to communicating with their lawyers, with very few trusting their lawyer at all.[458]

In terms of conditioning, many of the participants were concerned about the dangers of becoming involved in the Pālagi (White) justice system, citing that they did not want to be seen as attempting to be "more Pālagi" or dilute their cultural values.[459] In terms of culture, participants said that they avoided seeking legal assistance because of the shame associated with having to disclose their private details to a stranger.[460] In terms of connectedness, one of the participants said that the concerns of our women must come second to the concerns of wāhine Māori with respect to Te Tiriti.[461]

447 Ida Malosi and Sandra Alofivae *Women's Access to Justice: He putanga mo nga wahine ki te tika – Report on Consultation with Pacific Islands Women* (King Alofivae Malosi Barristers & Solicitors, 1996). For context, Malosi and Alofivae's report was one part of a larger research process by the Law Commission into Women's Access to Legal Services in 1999. See Law Commission *Women's Access to Legal Services* (NZLC SP1, 1999) at 2
448 Malosi and Alofivae, above n 449, at 4.
449 At 29.
450 At 7.
451 At 23.
452 At 21.
453 At 17.
454 At 9.
455 At 11.
456 At 9.

Regarding community, participants noted that not all of them had networks of support in place for navigating the justice system safely.[462] On the issue of caregiving, participants said that our families tend to include children in family matters. This meant that Pacific children could be negatively impacted when their parents are engaged with the justice system, with very little support offered to address this.[463]

The report had several limitations, including that the researchers struggled to locate women who had directly engaged with the justice system and that the women were reluctant to detail their family's interactions with the justice system.[464] Furthermore, all the consultees were Auckland-based and did not represent all of our communities living in Aotearoa New Zealand.[465]

The NZLC's report on women's access to justice referenced Malosi and Alofivae's findings and concluded that the lack of information about lawyers, the lack of diversity in the legal profession, and an insufficient user-focused approach to justice all contributed to systemic deficiencies in the delivery of private lawyer services.[466] Despite calls from NZLC's 1999 Report to increase diversity in all aspects of the legal profession, similar findings from the New Zealand Law Society's (NZLS) *Access to Justice* report of 2020 indicate that little progress has been made to systematically transform access to legal representation.[467]

Findings from that report suggest that the experiences of our women in 1996 may also reflect the experiences of many today. The report asked lawyers about the criminal legal aid system "and the types of services lawyers are providing for free or at reduced rates."[468] The research featured both quantitative and qualitative research, with 2,989 lawyers completing the survey and six in-depth interviews facilitated.[469] In terms of ethnicity, approximately 5 per cent of the participants identified as being of Pacific descent.[470] Barriers to justice identified by NZLS in their 2020 report include institutional racism, cultural incompetence, cost, and communication issues, echoing the findings of Malosi and Alofivae 20 years earlier.[471]

The report also found that the Pacific lawyers had significant difficulties in obtaining "good quality cultural reports for sentencing" (known as 'section 27' reports) due to the lack of report writers with the necessary cultural expertise.[472] Ultimately, the report identified the need to better serve Māori and Pacific communities by:[473]

457 Law Commission, above n 449, at 189.
458 Malosi and Alofivae, above n 449, at 20.
459 At 15.
460 At 12.
461 At 26.
462 At 25.
463 At 22.
464 At 2.
465 At 2.
466 Law Commission, above n 449, at 161.
467 New Zealand Law Society *Access to Justice: Stocktake of initiatives – Draft research report* (8 May 2020).
468 Kantar Public (Colmar Brunton) *Access to Justice Research 2021* (New Zealand Law Society, October 2021) at 10.
469 At 12 and 13.
470 At 71.
471 New Zealand Law Society *Access to Justice: Stocktake of initiatives – Research Report* (December 2020) at 12.
472 At 20.
473 At 20.

A. "Finding new ways to increase community understanding of the law and promote legal health, e.g., through pro bono legal education in schools and the community (including Māori and Pacific communities who may be less likely to attend events aimed at the wider general public)";
B. "Providing training for writers of section 27 cultural reports for sentencing; encouraging more people to undertake these reports"; and
C. "Stepping up efforts to encourage more Māori, Pacific Islanders, and other minority groups to enter the legal profession."

Moreover, RNZ's 2021 series "Is This Justice?" explored key issues with the current legal aid system as a part of its wider investigation into the justice system. Journalist Farah Hancock found that "[w]ithout a well-functioning legal aid system the worry is that only people who can afford to pay a private lawyer can afford justice."[474] The investigation identified that the dwindling number of legal aid lawyers was due to the low hourly rates and fixed fees for legal aid work that did not cover the extra hours of work and administration.[475]

It also noted that the Ministry of Justice's review of the legal aid system in 2021 was cancelled by Justice Minister Kris Fa'afoi as the Labour government intended to focus on "progressing the key issues from the 2018 review."[476] Further investigation by RNZ highlighted a reduction in the number of those eligible for legal aid from 1.2 million in 2007 to 400,000 in 2021.[477] Hancock attributed this reduction to the 2013 change in legal aid rules, where the eligibility criteria were tightened to combat the rising costs of providing legal aid, alongside the failure to adjust the eligibility criteria with inflation.

Hancock noted that now "[s]ome of the poorest of the working poor now do not qualify for help" and that "[e]lderly beneficiaries also do not make the cut."[478]

Critically, Chief Justice Helen Winkelmann declared that the legal aid system is "broken and may collapse if nothing is done about it."[479] Her Honour's comments worryingly echo those of the former Chief Justice Dame Sian Elias, who warned of "civic disorder" if the justice system did not resolve its imbalance of Māori and Pacific peoples in the system.[480] In October 2021, the NZLS released the results of its Access to Justice survey conducted by Kantar Public.[481] The survey included responses from 2,989 lawyers, a response rate of 21 per cent of the profession.[482] Of the 2,989 responses, 5 per cent identified as being of Pacific descent.[483] Overall, the report highlighted serious issues for New Zealand's legal aid system moving forward, including that:[484]

474 Farah Hancock "Legal aid system 'broken and may collapse' - Chief Justice" (12 October 2021) RNZ <www.rnz.co.nz>.
475 Hancock, above n 476.
476 Hancock, above n 476.
477 Farah Hancock "Minimum wage earners, pensioners no longer qualify for legal aid" (14 October 2021) RNZ <www.rnz.co.nz>.
478 Hancock, above n 479.
479 Hancock, above n 476.
480 Sian Elias, Chief Justice of New Zealand "Towards Justice: The rule of law as 'an unqualified human good'" (Sir John Graham Lecture, Auckland, 2018).
481 Kantar Public (Colmar Brunton), above n 470.
482 At 12.
483 At 71.
484 At 22.

24% of legal aid lawyers intend to do less or no legal aid work over the next 12 months, compared to 13% who intend to do more. This indicates a workforce under pressure.

Furthermore, lawyers cited concerns including:[485]

A. Inadequate remuneration;
B. Finding the work too stressful or time-consuming;
C. The administrative burden involved with undertaking legal aid cases; and
D. The complex needs of legal aid clients.

Concerning what the survey revealed about Pacific lawyers and legal aid, the report noted various statistics, including:

A. 37 per cent of Pacific lawyers were very or extremely interested in providing legal aid, higher than the average 12 per cent of lawyers.[486]
B. In an average week, lawyers spend 6 hours of their time providing free services, whereas Pacific lawyers spend 10 hours.[487]
C. Fewer than one in 10 lawyers (12 per cent) plan to do more, whereas twenty-three per cent of Pacific lawyers are more likely than average to say they plan to do more.[488]
D. Pacific lawyers and younger lawyers are more likely than average to be interested in providing free legal services to those who cannot afford to access the legal system.[489]

Catherine Peters from the NZLS interviewed two of our lawyers for their views on the survey.[490] 2021 Pacific Lawyers Association (PLA) Co-President Joseph Xulué noted concerns about the findings, commenting that: "If the current situation continues, the findings of the Law Society's survey suggest that ultimately we may see justice that is inaccessible."[491]

Fifty-four per cent of Pacific lawyers that participated in the survey rated helping those who could not afford legal assistance as "extremely important", higher than the national average of 40 per cent.[492] South Auckland-based barrister Panama Le'au'anae said that he and other Pacific lawyers often work extended hours to assist Pacific defendants and their families through the justice system.[493] However, many of these extended hours and additional support offered by Pacific legal aid lawyers are uncompensated. Those representing the PLA have repeatedly called for "[b]etter scrutiny of eligibility criteria and thresholds for legal aid applications and grants."[494]

485 At 23
486 At 52.
487 At 62.
488 At 63.
489 At 68.
490 Catherine Peters "Access to justice – A Pacific perspective" (2021) 948 LawTalk 20.
491 At 22.
492 At 20.

Furthermore, concerns about the lack of young Pacific legal aid lawyers have also led the PLA to advocate for "some [financial] assistance … provided to junior counsel, to allow them to participate in trials and progress in the profession."[495] The PLA also called for "[a] review of the fixed fee system … so that justice is available to all."[496] The PLA's responses are underscored by the immediate past president of the NZLS, Tiana Epati, who warned of the dangers faced by the legal aid system if the government fails to increase its funding.[497] Epati cites the increasing number of people attempting to access legal aid, with 20,000 applicants turned away in 2020. Epati observes that it is not uncommon for lawyers to turn away up to six clients in a day.

In our view, the opinions expressed by our Pacific lawyers and the Chief Justice demonstrate that the justice system is failing in its mandate to provide equal access to justice for all. Compounded by the failure of successive governments to enforce any radical interventions, many are left only "accessing a system, but not accessing justice."[498]

Diversity in Aotearoa New Zealand's Legal Profession

Attention to diversity, inclusion and equity issues has become more pronounced within Aotearoa New Zealand's legal profession over the last five years, particularly as they relate to gender and ethnicity. As of 2021, there are 15,554 lawyers currently practising.[499] The majority (54 per cent) identify as women, an increase of 10 per cent since 2011.[500] Of those, 76.8 per cent identify as NZ European, 6.9 per cent as Māori (the second most represented), and 3.3 per cent as Pacific.[501] Data from the 2019 "Snapshot of the [Legal] Profession" found that of all domestic students enrolled in the LLB degree in 2017 (across all law schools), 9.2 per cent identified as Pacific, 12 per cent as Māori, 21 per cent as Asian and 68 per cent as European.[502] While the total percentage of law students across all six law schools who identify as Pacific marginally exceeds our population, it is essential to consider how many students complete their LLB *and* enter the profession as practising lawyers.

While statistics on LLB graduation rates by ethnic group are not publicly available, based on the above we can identify that there is a notable drop-off between the number of our students entering law school and those working as practising lawyers. Furthermore, and as Chief Justice Winkelmann identifies, law schools are predominantly made up of individuals from affluent socio-economic backgrounds:[503]

493 At 21.
494 At 22.
495 At 22.
496 At 22.
497 Interview with Tiana Epati, Barrister and former president of the New Zealand Law Society (Kathryn Ryan, Nine To Noon, National Radio, 2 May 2022); and Nine To Noon "Legal aid system in grave danger if no new money in budget: senior barrister & ex crown prosecutor" (2 May 2022) RNZ <www.rnz.co.nz>.
498 Epati, above n 499.
499 James Barnett, Marianne Burt and Navneet Nair "Snapshot of the Profession 2021" (2021) 948 LawTalk 36.
500 At 39.
501 At 38.
502 George Adlam "Snapshot of the Profession 2019" (2019) 926 LawTalk 27 at 30.
503 Helen Winkelmann, Chief Justice of New Zealand "What Right Do We Have? Securing Judicial Legitimacy in Changing Times" (Dame Silvia Cartwright Address, Auckland, 17 October 2019) at 7.

> Studies of the intake of students into Universities and into Law Schools tells us that only one in 100 entrants to New Zealand's elite university courses come from the most deprived homes. Data sourced from six universities shows that 60 per cent of the almost 16,000 students accepted into law, medicine and engineering in the past five years came from the richest third of homes, and just 6 percent from the poorest.

The 1999 NZLC report investigating women's access to legal services made several observations about the unrepresentative makeup of the legal profession, most notably that people from groups which were overrepresented in the justice system and from disadvantaged populations (namely, Māori and Pacific peoples) were unable to find lawyers who understood their backgrounds.[504] The report also found that our women frequently found themselves underrepresented in the legal profession. Overwhelmingly, the message from consultees was that lawyers and judges were incapable of understanding our lives and the consequences of a conviction on our families.[505]

Malosi and Alofivae made several recommendations to address our women's concerns, including:[506]

A. Cultural education of professionals within the legal system;
B. For lawyers to speak in plain English;
C. Increased dissemination of information;
D. Breaking down the cost barriers;
E. Culturally appropriate measures and an increase of Pacific female legal professionals;
F. Breaking out of the institutional mould;
G. Letting Pacific island women lead by example;
H. Giving Pacific women confidence in "the system" through more control and choice.

Notably, the recommendation for better cultural education for legal professionals was also highlighted in the NZLS' 2020 *Access to Justice* draft research report that identified cultural incompetence as a barrier to accessing justice.[507] The draft research report also identifies the system's failure to understand and appreciate diverse social and cultural needs.[508]

Despite the extensive research published by the NZLC and NZLS, ethnically diverse communities still face considerable obstacles in accessing justice, with many of those same obstacles identified across generations.

Despite researchers providing evidence-based recommendations to address identified barriers, their recommendations are rarely acted on by legislators, policymakers, and the legal profession.

504 Law Commission, above n 449, at 169.
505 Malosi and Alofivae, above n 449, at 30.
506 At 30–37.
507 At 30; and New Zealand Law Society, above n 469, at 10.
508 New Zealand Law Society, above n 469, at 10.
509 Mike White "Diversity badly lacking among New Zealand's judges" (4 October 2020) Stuff NZ <www.stuff.co.nz>.
510 White, above n 511.

Pacific Peoples and the Judiciary

When picturing a judge, one might conjure an image of an old white man wearing robes and a wig looking down on the courtroom, gavel in hand, yelling: "Order in the court!." Though comical, this depiction is not far from the reality of Aotearoa New Zealand's current judicial makeup; 61 per cent of judges in the District Court are male (57 per cent being in the High Court, and 80 per cent in the Court of Appeal).[509] The Supreme Court, with six judges, is the only court with gender parity. Of the 172 District Court judges, 79 per cent are European, 16 per cent are Māori, and four per cent are Pacific.[510] No ethnicity records are kept for the appellate courts; however, no Pacific person currently sits on a senior court bench.

By those numbers alone, the percentage of Pacific District Court judges is near equal to the percentage of Pacific lawyers but falls short of our population total. The issue of judicial diversity has gained considerable attention in recent years alongside broader discussions of diversity in the profession. Although judges are required to execute their duties fairly and dispassionately, it is nevertheless essential that our courtrooms reflect the communities that they serve.

JUDICIAL COMPOSITION

There has been a concerted effort over the last decade to diversify Aotearoa New Zealand's judicial makeup. As Chief Justice Winkelmann said in her Dame Silvia Cartwright Address:[511]

> A fully diverse judiciary is important to the quality of the substantive law. This is because the path judges have walked through life shapes how they will and can develop the law.

In our view, a culturally and socially homogenous bench risks eroding public confidence in the impartial exercise of its duties. As it stands, the current judicial makeup falls short of representational equality across ethnic and gender lines. However, the current data collected by the Office of the Chief Justice does not provide a sufficiently comprehensive narrative of judicial diversity and omits the many other, and no less critical, identity intersections.[512] The only information collected about a judge is age, ethnicity, and gender. In response to this deficiency, the Judicial Diversity Survey 2021 surveyed 258 of the 312 judges currently presiding.[513]

Released in March 2022, the survey found that:[514]

A. 3.5 per cent identify as LGBTQIA+;
B. 12 per cent have a disability;
C. 24 per cent are religious;
D. 15 per cent have two parents who did not finish high school, 22 per cent have one parent who did not finish high school, and 47 per cent have two parents who were not university educated;
E. 9 per cent have a parent who was a lawyer or judge;
F. 43 per cent came from working at a law firm, 25 per cent at the independent bar, two per cent in the public sector and the remainder from "other areas"; and
G. 48 per cent have experience working in criminal defence, 43 per cent in family law and 29 per cent as Crown prosecutors.

The survey, reflecting 83 per cent of the bench, paints a more substantive narrative of our current judicial makeup, underscoring some archaic stereotypes attached to judges. As of 2022, there are five working judges of Pacific heritage: Judge Ida Malosi (Samoan, Principal Youth Court Judge), Judge Soana Moala (Tongan/Māori, Manukau District Court), Judge Mina Wharepouri (Tongan, Manukau District Court), Judge Lope Ginnen (Samoan/Pākehā, Manukau District Court) and Judge Michael Alaifatu Mika (Samoan, Lower Hutt). The first Pacific judge was Judge A'e'au Semi Epati (Samoan), who was appointed to the District Court bench in 2002.

Judges are typically appointed by the nomination of their peers from a pool of senior lawyers. As of April 2021, 75 per cent of lawyers who expressed interest in becoming a District Court Judge were Pākehā, 11 per cent were Māori, and three per cent were Pacific. Over half the applicants were men.[515]

From that round, only one Pacific Judge (Judge Mika) was appointed. As Tiana Epati explains, for lawyers from low-socioeconomic and historically excluded backgrounds, their pathway to the bench is rife with obstacles at the outset. Epati uses the fictional Pacific student of "Maria from Manurewa" to illustrate the issue:[516]

> Maybe Maria reads an inspirational story about a woman lawyer and tells her family she's going to law school. But has her low-decile school given her the skills to cope with law school's cutthroat environment where only a proportion of students progress past their intermediate year?
>
> Will her parents cope with her high fees and Maria not having a job that would help the family's income, for five years? Will she cope with having to bus from miles away to attend early-morning lectures, and working part-time after study?
>
> Even if she avoids becoming one of the many who succumb to law school's pressures, how does Maria from Manurewa then get one of the prized graduate positions in a big law firm?

511 Winkelmann, above n 505, at 5.
512 Chief Justice Helen Winkelmann *Annual Report: For the period 1 January 2020 to 31 December 2021* (The Office of the Chief Justice, March 2022).
513 Chief Justice of New Zealand *Annual Report: For the period 1 January 2020 to 31 December 2021* (Te Tari Toko i te Tumu Whakawa – The Office of the Chief Justice, March 2022) at 14.
514 At 15.
515 Anusha Bradley "Judges being surveyed to boost understanding of 'life and work' experience" (18 October 2021) RNZ <www.rnz.co.nz>.
516 White, above n 511.
517 Merriam-Webster "diverse" Merriam-Webster <merriam-webster.com>; Merriam-Webster "diversity" <merriam-webster.com>.

> And how does she stay in the profession, instead of diverting into something like policy or government department work? And how does she rise and get noticed, and possibly be considered as a judge?
>
> "We have got to keep the pipeline open, all the way to greatness," says Epati. "But at every point you can understand why someone will opt out and not make it to the top."

With fewer than three per cent of lawyers being of Pacific descent (with an ever-smaller portion holding senior legal roles), it is no surprise that only a handful of our lawyers have succeeded in becoming judges. However, we contend that the issues surrounding diversity in the judiciary require more critical nuance. Foremost, a single person cannot be "diverse." By definition, "diverse" means "differing from one another" or "the condition of having or being composed of differing elements."[517] It describes a collective group condition in which individuals set themselves apart from each other across myriad identity markers. In concrete terms, a single Pacific woman cannot be the bearer of diversity without a counterpart(s); it is only together that they make the diverse group. The discussion around the need to hire more *diverse* judges (i.e., women, people of colour, people from low-socioeconomic backgrounds and so on) implies the existence of 'non-diverse' judges. As Lisa-Marie Kraus explains:[518]

> Excluding straight White men from "diversity" by [implicitly] referring to them as "nondiverse" is a counterproductive practice in the grander efforts made to establish equality. This exclusion perpetuates processes of Othering as labelling straight White men as "nondiverse" enhances their self-image as being outside the diverse society. It alienates this group from the topic and makes them believe they do not have any role in issues of diversity. In this way, it promotes White masculine heteronormative structures in which straight White men are perceived to be the norm, the superior standard, that everyone else deviates from. … As such, it clears White men of their responsibility and engagement in diversity issues as it makes them believe that they do not have any role of responsibility in the issue.

SO, DOES "DIVERSITY" MAKE A DIFFERENCE?

It is not controversial to suggest that a judge's life experiences may have some bearing on their decision-making. As the Chief Justice observes:[519]

> First, it means that we are right to place importance upon diversity in judicial appointment. The diversity we seek is not aimed at a statistical mirror image of society. But we should ensure that our judiciary is not exclusively drawn from the same narrow part of society. The diversity we aim for should be sufficient to ensure that there is a richness of thought and experience in our judiciary available to contribute to the development of the law.

518 Eviatar Zerubavel *Taken for Granted: The Remarkable Power of the Unremarkable* (Princeton University Press, Princeton, 2018) as cited in Lisa-Marie Kraus "'Diversity' includes White people, too" (12 May 2021) IMISCOE: Phd Blog <www.imiscoe.org>.

But to what extent might a judge's racial, ethnic, class and cultural background(s) (alongside other identity markers) substantively impact their decision-making? Does the presence of racial minorities on the bench tangibly impact both the development of the law and legal outcomes? How might we comprehensively evaluate racial diversity and representation on the bench? To date, there has been scant analysis of these questions in Aotearoa New Zealand, yet they have been the subject of extensive scholarly attention in the United States. While it is impossible to traverse the myriad literature, we have identified three studies that explore race and judicial decision-making that are most relevant to this discussion.

What are the consequences of judicial diversity? This was the question posed by Jonathan Kastellec in his paper "Racial Diversity and Judicial Influence on Appellate Courts" which evaluates the substantive consequences of judicial diversity on the United States Court of Appeals in respect of race-based affirmative action cases decided between 1971 to 2008 (182 total).[520] Kastellec codes each decision as either "conservative" or "liberal" based on whether the judge voted to strike down any part of an affirmative action plan (in respect of hiring decisions or college admissions) for being in violation of the 14th Amendment to the Constitution.[521] In terms of case composition, 84 per cent of cases were heard by a panel (three) of non-Black judges; 28 per cent had a single Black judge, and 1 per cent had two Black judges. The decisions were collated using matching methods onto two logit tables. Overall, Kastellec found that Black judges were more likely than non-Black judges to vote in favour of affirmative action programmes.[522]

By percentage magnitude, the average probability of a non-Black judge voting liberally was 56 per cent (rising to 65 per cent if they are a Democrat appointment), compared to 90 per cent if they were Black. In concrete terms:[523]

> [It] is clear that the difference between how black and nonblack judges vote in affirmative action cases is substantially very large—even when we compare black judges who are similar to nonblack judges on every dimension *except* race.

Notably, the data demonstrated that non-Black judges were likelier to vote in favour of affirmative action policies when sitting with a Black colleague. By comparison, they were predicted to vote liberally in only 50 per cent of cases when sitting with two non-Black colleagues. When a Black judge was part of the three-judge panel, this probability rose to 80 per cent. In only one case did a Black judge dissent. In discussing these findings, Kastellec contends that while Black judges comprise a small portion of all Court of Appeal judges, their impact is still significant in cases where race is a salient issue in the proceedings. In respect of the majority rule on three-judge panels, "the random assignment of a black judge to a three-judge panel in affirmative action cases nearly ensures that the panel will issue a liberal decision."[524]

519 Winkelmann, above n 505, at 6.
520 Jonathan P Kastellec "Racial Diversity and Judicial Influence on Appellate Courts" (2013) American Journal of Political Science 167.
521 At 173.
522 At 177.
523 At 177 (emphasis omitted).
524 At 179.

Kastellec suggests that this is demonstrative of the "deliberation effect" in action whereby Black judges can offer to their non-Black colleagues' information and insights tied to their life experiences that may impact how the panel understands and decides on questions of race/racism.[525] While it is inappropriate to comment on the substantive merits of each case, the findings nevertheless lend weight to the argument that judicial diversity enhances diversity in the decision-making process of appellate court benches by increasing the range of perspectives offered. To quote Scott Page:[526]

> … a court of nine diverse people is wiser than a court of identical minds because members of a diverse court bring different ideas to bear and productively challenge one another's interpretations of the law.

That the presence of racial minority judges on a multi-member panel can affect case outcomes on race-specific issues is important. While such proceedings are less common in Aotearoa New Zealand, it is worth considering what impact entirely Pākehā panels have, or have had, on cases explicitly concerning Tikanga Māori, Te Tiriti, and racial discrimination, and what difference, if any, the presence of non-Pākehā judges would make.

In the criminal justice context, the 1988 paper "Do Black Judges Make a Difference?" considered the behaviours of Black and White trial judges when sentencing criminal defendants.[527] The study asked whether the appointment of Black judges made a difference in the kind of justice meted out in United States courts. The authors evaluated whether Black judges made a difference in terms of symbolic versus substantive justice: the former referred to Black people being able to look to the courts and see members of their race in positions of influence and decision-making authority.[528] Substantive justice occurred where Black people on the bench would act in a manner that advanced the best interests of their community in "reducing vestiges of racism that remained in the legal system."[529] The study was based on a sample of 3,418 male defendants convicted of a felony offence between 1968–1979 in Northwestern's Metro City. The decisions of ten Black judges and 130 White judges were considered.

The authors' three-stage analysis examined the difference between Black and White judges without controls, with controls for the defendant and their case, and then finally with controls for other characteristics of the judges themselves.[530]

The study found:

Sentencing to prison:

A. Assessing the findings for all defendants, Black judges were moderately more severe in sentencing than White judges. However, when controlled for the judge's gender, prosecutorial experience, and time on the bench, the difference was negligible.[531]
B. The treatment of Black defendants did not differ between Black and White judges. However, Black judges "are significantly more likely to sentence *white* defendants to prison than are white judges", controlling for the type of offending, prior criminal record, extra-legal factors, and the judge's characteristics.[532]
C. When considering the reasons for this, the authors found that:[533]

> … the fairest conclusion is that the reason black judges are more likely than white judges to send white defendants to prison is that black judges tend to treat black and white defendants alike, while white judges are more severe with blacks, compared with white defendants.

Sentencing severity:

A. Controlling for characteristics of the judges, the sentences of Black judges are significantly less severe than White judges.[534]
B. Additionally:[535]

> Examining sentence severity for black and white defendants separately, … black judges may give white defendants *somewhat more severe sentences* than [the] white judges, but the differences are far from significant. But for black defendants, black judges give *lighter sentences* than do white judges.

C. The authors determined that:[536]

> Nonetheless, it tentatively appears that black judges may slightly favour defendants of their own race when determining the overall harshness of the sentence, while white judges probably do not do so. However, in the decisions about incarceration, black judges appear even-handed, while white judges are less likely to send whites than blacks to prison.

The authors note that studies exploring racial differences in judicial behaviour were burgeoning, and this was by no means a conclusive study given the inevitable variables involved in each case.[537]

However, they concluded that there is a noticeable difference between the sentencing decisions of Black and White judges that could be attributed to race.[538] The authors acknowledged that these differences are "significant" given that Black judges went through the same socialisation processes at law school, are required to adhere to legal precedent, and are appointed the same way as White judges. In our view, this sustains the argument that different lived experiences (especially from a racial/ethnic lens) may substantively impact judicial decision-making, even where individual discretion at sentencing is constrained.

525 At 179.
526 Scott Page "Sotomayor's Diversity and the Supremes" (18 July 2009) The Huffington Post <www.huffpost.com>.
527 Susan Welch, Michael Combs and John Gruhl "Do Black Judges Make a Difference?" (1988) 32 American Journal of Political Science 126.
528 At 126.
529 At 126.
530 At 131.
531 At 131.
532 At 131.
533 At 132–133.
534 At 133.
535 At 133.
536 At 133–134.
537 At 134.
538 At 134.

In their article, "Do Judges Vary in Their Treatment of Race?" David Abrams, Marianne Bertrand and Sendhil Mullainathan explored whether ethnic minorities are treated differently in the legal system.[539] At the time of publication, Black men were incarcerated at six and a half times the rate of White men, with the United States having the highest rate of imprisonment per capita in the OECD.[540] The data was sourced from felony cases in the Circuit Court of Cook County Illinois, the largest unified court in the country.[541] By assessing the sentencing decisions of Black and White defendants through random assignments, the authors found that "there is substantial excess heterogeneity in the empirical distribution of the racial gap in the incarceration rate", which, quantitatively speaking, is of "considerable magnitude."[542]

While acknowledging that those sentencing decisions are not "race-blind", they recommend that the first step is to understand the sources of variation in the justice system.[543]

The obvious limitation of these three studies is that the authors could not interview individual judges about their decision-making process, relying solely on actual case data. This research gap was addressed by sociologists Matthew Clair and Alix Winter in their paper "How Judges Think About Racial Disparities", a qualitative study that interviewed 59 state-level judges from a North Eastern state on their subjective understandings of the causes of racial disparities in the justice system.[544] The state in question disproportionately incarcerated Black and Latinx peoples at a ratio of four and 2.5 times, respectively, their representation of the population.[545] Of the sample, 72 per cent of judges were White, 17 per cent were Black, and 11 per cent were 'Other'; 64 per cent were male, and 36 per cent female; 68 per cent were appointed by a Democratic Governor with 32 per cent by a Republican; 31 per cent were state prosecutors prior to their appointment.[546]

1 — Explanations For Racial Disparities[547]

In sum, participant beliefs about the causes of racial disparities in the justice system fell into two broad, but not mutually exclusive, categories: that justice processes treated racial minorities differently and/or that those individual offenders, socio-economic disenfranchisement, and that their upbringing was responsible for their overrepresentation.[548]

A. Nearly all the judges acknowledged and expressed concern about the existence of racial disparities in the justice system;[549]
B. 76 per cent cited differential treatment within the justice system and the disparate impacts of poverty, family dysfunction and the disparate impacts of facially neutral laws as the reason for this disparity. Only 24 per cent attributed this to disparate impact alone.[550]
C. Some judges located the courtroom (and thus their role) within a broader discriminatory society, referring to racism as something that "permeates the entire [legal] system."[551]
D. Many of the judges acknowledged the possibility that they harboured implicit and explicit biases that may contribute to racial disparities, including judges from racial minority groups.[552]
E. Twenty-two per cent of judges considered that racial disparities in the justice system were a result of disparate impact alone and did not believe that they, nor their colleagues, were biased. For example, one judge (Judge 101, White female) "attributes racial disparities to higher rates of drug use among minorities" and does not find these disparities in the justice system to be problematic "given her belief that drugs damage individuals and communities." For her, strict drug laws are a "protection policy," not a "racist policy." This judge was particularly critical of "theoretical liberal White thinkers" who find racial differences in conviction rates to be inherently problematic.[553]
F. Notably, one judge (racial minority, female) believed that incarceration was the only way to protect minority defendants who might not otherwise survive in the community. She told the authors, "I am thinking if I let this kid go back into the community, the kid's coming back in a body bag."[554]
G. One judge posited that some racial minorities have a "cultural attraction to being part of the system as if it were a badge of honor." One judge (racial minority, female) commented:[555]

> [T]here seems to be almost like a self-fulfilling prophecy for a lot of young Black men … that it is OK to go to [jail], that it is a badge of honor. … Sometimes they want to go because that's where their best friend is.

2 — Strategies For Dealing With Racial Disparities

All judges employed strategies to address racial disparities within the justice system. These were broken down into "stage-specific" decisions relating to problems encountered at specific points on the justice continuum.[556] These strategies were then located under two broad categories: non-interventionist and interventionist, as represented in the following table:

539 David S Abrams, Marianne Bertrand and Sendhil Mullainathan "Do Judges Vary in Their Treatment of Race?" (2012) 41 The Journal of Legal Studies 347.
540 At 347.
541 At 353.
542 At 376.
543 At 376.
544 Matthew Clair and Alex S Winter "How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice system" (2016) 2 Criminology 332.
545 At 337.
546 At 339.
547 At 340.
548 At 343.
549 At 340.
550 At 340.
551 At 340.
552 At 341.
553 At 342.
554 At 342–343.
555 At 343.
556 At 343.

Table 1. Noninterventionist and Interventionist Strategies, by State of the Court Process

Stage	Noninterventionist	Interventionist
Arraignment	Defer to charges and bail requests brought by prosecutor and police department	Question prosecutor's charging decision on basis of racial disparity; consider broader racial patterns and possible biases of both attorneys when setting bail
Plea Hearing	Accept most deals agreed on by both sides	Reject deals deemed unfair or racially disparate even if agreed-on by both sides
Jury Selection and Management	Any impartial juror will do; foreperson selected randomly and/or leadership skills	Active attention to empaneling a diverse jury; active monitoring of peremptory challenges; foreperson should be the same race as the defendant
Sentencing	Strive for consistent sentencing within one's caseload (internal consistency)	Strive for consistent sentencing within the full criminal justice system (external consistency); consider minority/low-income status as a mitigating factor

Table 2. Number of Judges Employing Each Strategy Category, by Stage

Strategy	Arraignment (N=48)	Plea Hearing (N=48)	Jury Selection (N=48)	Sentencing (N=48)
Interventionist	12	7	13	7
Noninterventionist	36	41	35	41

Table Reference: Matthew Clair and Alex S Winter "How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice system" (2016) 2 Criminology 332 at 344.

2A — Arraignment

As above, 75 per cent of judges tended to adopt a noninterventionist approach to arraignment hearings.[557] One of the main reasons offered for this was that, as a first-stage hearing, judges lacked detailed information about the defendant's circumstances and leant heavily on the submissions made by legal counsel.[558]

As stated by one judge:[559]

> [T]his stage of the court process [is] one of the toughest because you really do not know a lot about the case so you have to consider as much information as you have in front of you and, um, do your best."

As a result, differential treatment may reveal itself through the actions of individual prosecutors. Twenty per cent of judges employ an interventionist approach at the arraignment stage by actively questioning the charges and the arguments for pre-trial bail. For example, one judge commented that:[560]

557 At 345.
558 At 345.

> Similarly, Judge 103 relayed that he and a group of fellow judges noticed a pattern of differential treatment in the charges prosecutors were bringing for similar behavior "a few years back:" "[A]ll the Black folks and Puerto Rican folks are coming in charged with felony larceny and the White folks are coming with just shoplifting," a less serious charge. In response, "one of our colleagues went out of line and said, 'no, I'm not going to let this happen.' … [and] it changed for a while."

2B — Post-Trial Sentencing

At this stage, 85 per cent of judges said they do not account for racial disparities when determining individual sentences.[561] The reasons for this approach largely concerned the application of legal precedent and tailoring each sentence to the specific aggravating and mitigating circumstances of each case.[562]

As such, "[a]t the sentencing stage, racial disparities that have emerged at earlier stages of criminal justice processing are locked in."[563] One judge commented that:[564]

> I try to recognize when there have been a lot of times where the people before me didn't get equal treatment—not by me but somewhere along the way. [But] I'm not meant to equalize it; I just cannot get to it.

While many judges were cognisant of the racial disparities resulting from their sentencing decisions, they felt the best they could do was to ensure their approach was fair and consistent. Of the few judges that employed an interventionist approach, they strove to account for racial disparities emerging through disparate impact before sentencing. By way of example, one judge commented:[565]

> There's this temptation to overvalue the class issue which shows up a lot in sentencing and other places. So why should I give the benefit of the doubt to the wealthy young man who objectively has a better chance … versus someone who never had a break in his life? Should that person get punished more severely? … In fact, in some ways, I carried the bias against the wealthy kid who, despite of all of the benefits in his life, was willing to go and hold up a store even though he didn't need the money!

To conclude, the authors found that noninterventionist decision-making by the majority of judges in the sample helped entrench persistent racial disparities in the justice system despite "well-intentioned judging."[566]

> [E]ven when judges are not explicitly racist and even when they acknowledge, and attempt to account for, their implicit biases, they still may unintentionally

559 At 345.
560 At 345.
561 At 349.
562 At 349.
563 At 349.
564 At 350.
565 At 350.
566 At 353.

> contribute to racial disparities through noninterventionist decision-making that does not account for potential differential treatment by other actors or for the disparate impact of poverty and facially neutral laws, such as mandatory sentencing minimums … or the cumulatively disadvantaging effects of defendants' prior criminal records.[567]

While there are notable differences between Aotearoa New Zealand's justice system and that in the United States, the findings from this study have implications for legal research here, given that we also experience similar patterns of racial inequity throughout our justice system. In our view, the benefit of a qualitative approach to situational decision-making allows for more nuanced perspectives to emerge that would otherwise be impossible to glean from examining extant data alone. As the authors state, "by tracing how broader social and cultural processes structure situation-specific decisions, researchers can identify particular, modifiable instances in which actors contribute to disparity-producing processes."[568] We suggest that a similar study conducted in Aotearoa New Zealand would assist in informing and extending theoretical perspectives about the merits of diversity within the legal profession. Given our comparatively smaller pool of judges, a representative sample study with 30 participants (anonymised) is a realistic first step in gathering insight into these issues.

JUDICIAL TRAINING AND CULTURAL COMPETENCY

Te Kura Kaiwhakawā – Institute of Judicial Studies (Te Kura) is responsible for the ongoing training of presiding judges. Te Kura aims to:[569]

A. Support judges in the ongoing development of their judicial careers;
B. Promote judicial excellence; and
C. Foster an awareness of developments in the law, its social context, and judicial administration.

In 2004, Te Kura underwent an independent review identifying nine future focus areas. Focus area five recommends that the Institute "provide programmes that touch on the work of each jurisdiction which enables judges to operate effectively in the social and cultural diversity of New Zealand."[570] As a result, nine core elements were introduced into their curriculum. Component six states that judges must "be responsive to the relationship between the judiciary and society and to changes in society."[571]

The component is organised as follows:

Component Six	Social Contexts
Element 6.1	Tangata Whenua; Te Reo Māori in the Courtroom
Element 6.2	Gender and Family Issues including Children
Element 6.3	Equality and Diversity - Multicultural New Zealand
Element 6.4	Disability and Disadvantage

It is not explicitly stated whether, and to what extent, this component includes cultural competency training relating to Pacific peoples. However, component seven of Te Kura's 2010 to 2015 strategic plan aims to "enable judges to orient to the current and changing diversity of New Zealand communities." This includes:[572]

A. Providing programmes that enable judges to operate effectively in New Zealand's diverse communities;
B. Identifying opportunities in programmes to consider the impact of the law and courts on New Zealand's diverse communities; and
C. Assisting judges to communicate the role and the work of their court to a wider audience and particularly the community in which they operate.

In 2022, presiding judges underwent two days of diversity training. The prospectus described the training:[573]

> As New Zealand society and courtrooms become more diverse, judges need new tools and skills to navigate the changing landscape. At the core of getting to grips with the increasing diversity of our courtrooms is your duty to ensure that every person who appears in your court has equal access to a fair trial, where evidence is assessed impartially and without prejudgment.
>
> Judges need the opportunity to discuss and reflect on the challenges they face in this area. This seminar provides a forum in which you can safely assess and build your intercultural competence by developing greater awareness and understanding of different communities' sensitivities, cross-cultural experiences, and communication issues in court. You will be supported by experts in this field, with a focus on three or four specific communities.

In June 2021, we partnered with the University of Auckland's Equal Justice Project Pro Bono team (EJP) to explore judicial diversity and cultural competency initiatives available to judges in Aotearoa New Zealand, specifically focusing on Pacific peoples. EJP assessed the current judicial initiatives and compared them to the cultural competency training and analyses done in Australia, Canada, the United Kingdom, and the United States. EJP found that:[574]

A. Aotearoa New Zealand provides various programmes and initiatives with aims to increase the cultural competency of its judiciary; however, it is acknowledged that the judiciary lacks diversity and cultural competence across several metrics;

567 At 354.
568 At 355.
569 Te Kura Kaiwhakawā (Institute of Judicial Studies) "Mō Mātou: About Us" <https://tkk.justice.govt.nz>.
570 Institute of Judicial Studies "Recent Developments" Institute of Judicial Studies <ijs.govt.nz>.
571 Institute of Judicial Studies, above n 572.
572 Institute of Judicial Studies *Strategic Plan: 1 July 2010 - 30 June 2015* (January 2011) at 8.
573 Te Kura Kaiwhakawā (Institute of Judicial Studies) *Prospectus 2022* at 6.

B. There is currently both a lack of published literature on the subject and a lack of initiatives to develop cultural competence towards Pacific peoples;
C. The majority of cultural competence programmes offered are focused on Māori;
D. There has been a push for increased cultural competency across the jurisdictions of Australia, Canada, the United Kingdom, and the United States; and
E. Australia has developed the most comprehensive programmes and initiatives to better provide for cultural competency and judicial diversity, which could significantly influence cultural competency initiatives in Aotearoa New Zealand, specifically regarding Pacific peoples.

In Aotearoa New Zealand, current cultural competency initiatives include a 2021 programme called "Diversity", in which "judges can reflect on the challenges they face with cultural competency, through developing a greater awareness of the diversities within New Zealand communities and their sensitivities."[575] Our Official Information Act 1982 (OIA) request for more information about this training was declined. EJP notes that Te Kura's prospectus demonstrates that initiatives are available to encourage cultural competency within the current judiciary.

Details about the judicial training on Pacific cultures are not provided to the public; however, Te Kura has stated that there is diversity education on Pacific cultures and that they will continue to develop them further.[576] In 2019, the Safe and Effective Justice Group recommended more effective training for the judiciary as "the system fails to meet the needs of those from Māori, Pacific, migrant, and refugee, disabled and LGBTQI+ communities."[577] EJP's cross-jurisdictional analysis of judicial competency programmes identified that Australia is developing advanced cultural competency and safety training, moving beyond mere cultural awareness training.

A focus on the obligation to deliver a fair trial has meant the Australian judiciary takes part in a wide range of programmes, including short courses, workshops, guest speaker seminars, conference presentations, immersion tours and community visits.[578]

Nevertheless, common criticisms of cultural competency training, such as their brevity and infrequency, echo similar sentiments of criticisms of cultural competency here in Aotearoa New Zealand. Ultimately, in our view, cross-cultural competencies and anti-racism training should be embedded in legal education from part I of the LLB degree and continued by professional development.[579] Moreover, a question mark hangs over whether the fact of hiring more Pacific people as judges tangibly improves the outcomes of our people navigating the justice system.

574 Iutita Evans and others *Pasifika Peoples and the Criminal Justice system* (Equal Justice Project, April 2021) at 2.
575 At 5; Te Kura Kaiwhakawā, above n 575, at 6.
576 Evans, above n 576, at 6.
577 At 8; and Te Uepū Hāpai i te Ora (Safe and Effective Justice Advisory Group) *Turuki! Turuki! Move Together! Transforming our criminal justice system* (2019) at 13.
578 Evans, above n 576, at 12.
579 At 16.
580 Ministry of Justice "Rangatahi Courts & Pasifika Courts" <https://youthcourt.govt.nz>.
581 Briefing for Hon Amy Adam, Minister of Justice "Initial analysis of reoffending rates in the Rangatahi and Pacific Courts" (15 December 2014) justice system-05-40-05 at 14 (obtained under Official Information Act 1982 request to the Reducing Crime Policy Group, Ministry of Justice).

THE PACIFIC YOUTH COURT

The New Zealand Youth Courts are divisions of the District Court governed by the Oranga Tamariki Act 1989, handling offending by persons between 12 and 16 years of age. The Pacific Youth Court (PYC) was established in 2010 as a response to the disproportionate overrepresentation of Pacific youth in the justice system. Two PYCs are operating, in Mangere and Avondale, respectively. Unlike mainstream courtrooms, the PYC is adorned in pan-Pacific cultural attire such as tapa, artwork, and weaving and conducted in churches or community centres. The hearing opens with a prayer followed by a formal greeting specific to the young person's ethnic background.

Alongside the presiding PYC Judge are elders of our community. Participation in the PYC is not mandatory; young people and their families engage voluntarily. Furthermore, the PYC is open to all youth offenders irrespective of ethnic background. All youth offenders will first appear in the mainstream youth court, and if their charge(s) is not denied and/or proved, then a FGC is ordered.

At the FGC, a comprehensive plan is formulated, which may include a provision for monitoring by the PYC. A typical PYC hearing involves a briefing between the judge and the elders to discuss how each young person is progressing with their plan. Each case will start and end with a prayer.

An elder from the same cultural background as the young person will talk to the young person and their family, offering encouragement and guidance.[580] An initial analysis of the offending rates in the PYC described the aim of the PYC as providing "the best rehabilitative response to Pacific youth offenders by encouraging strong cultural links and meaningfully involving communities in the youth justice process."[581] The PYC aims to provide wrap-around cultural support so that young people can take accountability for their actions and make reparations for the harm committed.

To date, no quantitative evidence demonstrates that participation in the PYC reduces recidivism. Furthermore, there has been no independent review of the Pacific Youth Court. This is surprising given that it has existed for more than a decade and equivalent youth courts — such as the Rangatahi courts — have undergone periodic reviews.[582]

However, two unpublished research theses by Pacific scholars discuss the PYC in detail: Lagi Tuimavave's research on its statutory and jurisprudential framework, key features, and an analysis of those features' transferability; and Natasha Urale-Baker's research on Samoan Youth Perspectives of the PYC.[583]

One of the unique features of the PYC is the involvement of Pacific elders as lay advocates. The elders are from each Pacific island and support the presiding judge. Their function reflects the values embedded in our cultures to respect one's elders and learn from their wisdom and guidance. Their role is to offer the young person encouragement and guidance throughout the hearing while also providing insights into cultural matters

582 See Heemi Taumaunu "Rangatahi Courts of Aotearoa New Zealand – an update" (2014) 11 Māori L Rev 3; and Heemi Taumaunu "Rangatahi Courts of New Zealand: Kua Takoto te Mānuka, Auē Tū Ake Rā!" in Veronica MH Tawhai and Katarina Gray-Sharp (eds) *'Always Speaking': The Treaty of Waitangi and Public Policy* (online ed, Huia Publishers, Wellington, 2011).
583 Lagi Tuimavave "The Pasifika Youth Court: A Discussion of the Features and Whether They Can Be Transferred" (LAWS523 Research, Victoria University of Wellington, 2017); and Natasha Urale-Baker "*Aua le limatētē ina ne'i ola pala'ai fanau*: Samoan youths' views on their experience in the Pasifika Youth Court" (MA Thesis, University of Auckland, 2016).

regarding the offending and subsequent rehabilitative interventions.[584] Tuimavave found that "through the lay advocates and elders, culturally responsive pedagogy is in place not only through the knowledge they impact but also through their influence toward equity and justice."[585] The second key feature is community involvement, designed to assist in the reconciliation and reparation for the harm committed.

In the PYC context, this collective endeavour involves the victim, offender, and their families. As the Ministry of Health identified in its *Youth crime action plan 2013–2023 Report*, "[Pacific] communities are actively involved in designing, developing, and implementing responses to … [youth offenders], resulting in more effective responses."[586]

Finally, the presiding PYC judge is Judge Ida Malosi, the first Pacific woman Judge in Aotearoa New Zealand. Formerly the Chief Justice for the High Court of Samoa, "Judge Malosi is afforded respect from youth offenders because she is relatable and can be compared to the biological kin of the young person."[587] Tuimavave describes the hearing process as "inquisitorial" instead of the adversarial nature of mainstream courtrooms, finding that families are welcome to participate in the process actively. Importantly, the judge sits at the same level as the parties collapsing the literal hierarchy of the mainstream courtroom.

Urale-Baker's small, qualitative study into the experiences of young Samoan people during their attendance as offenders in the PYC was the first qualitative study of PYC attendees and remains the only one to date. The study involved talanoa with five 20-year-old Samoan male participants who had attended the PYC at either 15 or 16 years of age. Urale-Baker organised participant experiences into four themes:[588]

A. Pasifika/Samoan culture in the PYC;
B. Interaction with the judge;
C. Comparisons between the PYC and Manukau Youth Court (MYC); and
D. Involvement with Genesis Youth Trust.

Urale-Baker found that the PYC's "social and physical environment … prompted participants to adhere to *fa'a samoa* cultural protocol."[589] This was enhanced through the presence of cultural attire, rituals, and adornment within the courtroom. Participants responded positively to the presence of Pacific elders and a Pacific judge.

In respect of the latter:[590]

> The Judge was perceived to occupy four roles: a Judge, an elder, a mother, and "one of us" — a member of the Samoan community to which the participants also belong.

584 Lagi Tuimavave, above n 585, at 12; and see Andrew Becroft, Principal Youth Court Judge of New Zealand "The Youth Courts of New Zealand in Ten Years Time: Crystal Ball Gazing or Some Realistic Goals for the Future?" (Paper presented to the National Youth Advocates/Lay Advocates Conference, Auckland, 13–14 July 2015) at 13.
585 Tuimavave, above n 585, at 13.
586 At 14; and Ministry of Health *Youth crime action plan 2013–2023 Report* (2013) at 21.
587 Tuimavave, above n 585, at 14.
588 Urale-Baker, above n 585, at 46–47.
589 At 46.
590 At 46.

Participants also compared their experiences in the PYC vis-à-vis the MYC. Participants stated that "there was a sense that at the [MYC] there was a pressure to demonstrate a resistance to the establishment, in contrast to the PYC where participants were motivated to cooperate."[591]

Urale-Baker concludes that the PYC, coming under the umbrella of therapeutic courts, has a vital role in humanising Pacific offenders. The inclusion of the elders serves a critical function in providing "filial roles for the simple reason that many of these young offenders will be accustomed to being chastised, questioned, and commanded by elder relatives."[592] While this statement is arguably true for the study's participants and many others, we must be careful not to essentialise the Pacific youth experience.

For those not raised in a "traditional" Pacific household, admonishment from an elder and other cultural processes present in the PYC may engender feelings of isolation, alienation, and confusion for some. Moreover, Urale-Baker questions whether the PYC's restorative justice processes are fully realised, noting that, while its overarching goal is to facilitate reconciliation and rebuilding between the offender, their families, and community, not all restorative justice processes are present.[593]

The hearing does not mention reparations to victims nor requires formal apologies — although Urale-Baker notes this may occur in the preceding FGC. The restoration aspect prioritises the offenders' cultural engagement with their Pacific Island culture, grounded in the belief that "greater identification with a cultural identity will reduce youth crime in some cases."[594] Urale-Baker challenges this hypothesis, although she acknowledges that "there are hints in the interpretation here that a greater connection with culture had played a role in [the] participants' shift away from re-offending", noting that all five participants had not reoffended since age 16.[595]

A fundamental limitation of Urale-Baker's research is that:[596]

> … it cannot designate causality between the PYC and offending, nor can the findings be widely generalised. Rather, it presents a set of ideas that represent the perceptions of a given group of individuals.

Urale-Baker makes the following recommendations for further research:[597]

A. Exploring the characteristics of Pacific children that do not criminally offend;
B. Whether traditional cultural "guards" protect youth from crime;
C. Holding talanoa with a larger participant group; and
D. Undertaking a large-scale study attempting to evaluate the effectiveness of the PYC, utilising police records and other measures of offending over a period of time following Pacific youth at the PYC.[598] This would be a quantitative evaluation of the PYC's effectiveness through a different lens.

591 At 47.
592 At 88.
593 At 91.
594 At 91.
595 At 91. There is no publicly available data on the recidivism rates for all PYC attendees.

Urale-Baker also made the following recommendations for relevant policymakers, the courts, and social services:[599]

A. Maintain, if not increase, the presence of elders in the PYC;
B. Provide resources for travel remuneration for participants;
C. Greater clarification on the recruitment process for PYC judges; and
D. To consider having a male judge sit alongside the presiding female judge for gender parity.

Bail

The Bail Act 2000 governs whether a person is granted or refused bail. Under s 7, a person is bailable as of right where they are charged with an offence not punishable by imprisonment and/or where an offence carries a maximum punishment of fewer than three years imprisonment.[600] This reflects the fundamental presumption of our justice system that a person is innocent until proven guilty. Bail hearings are often described as the "bread and butter" of our justice system, with hundreds of applications heard in the District Court and High Court each day. Despite their quotidian nature, bail determinations are a critical justice issue where many competing interests converge.

From 2011 to 2018, Pacific people have consistently been 11 per cent of the bail population (inclusive), dropping by 1 per cent in 2019 and 2020.[601]

AMENDMENTS TO THE BAIL ACT 2000

In 2013, several significant changes were made to the Bail Act by the Bail Amendment Act 2013 and the Family Violence (Amendments) Act 2018 (FVAA). Under the Bail Act, the usual starting point for a person charged with an offence (that is not bailable as of right) is that they should be granted bail as they await trial.[602]

This is consistent with the right of being presumed innocent until proven guilty.[603] However, a court may authorise the continued detention of a person if they are satisfied there is "just cause" for such detention. This determination will be based on the following mandatory considerations in s 8 of the Bail Act (as well as any other relevant considerations in the section):

596 At 97.
597 At 98.
598 At 99.
599 At 99.
600 Bail Act 2000, s 7.
601 Ministry of Justice *People remanded on bail or at large, and offending while on bail or at large* (20 September 2022) <www.justice.govt.nz>. On this spreadsheet, data is taken from "Table 1c: Number and percentage of people remanded on bail or at large, by remand type and ethnicity, 2011/2012 – 2020/2021."
602 Bail Act, s 7(5).
603 New Zealand Bill of Rights Act 1990, s 25(c).
604 Bail Act, s 8(1).
605 Bail Amendment Act 2013, s 7.
606 Section 12.
607 Section 8.

A. whether the defendant may fail to appear in court on the correct date; or
B. whether the defendant may interfere with witnesses or evidence; or
C. whether the defendant may offend while on bail; and
D. any other matter that would make it unjust to detain the defendant.[604]

The Bail Amendment Act removed the presumption of bail as the starting point for specific offences. For example, if a defendant is charged with murder,[605] a Class A drug offence,[606] or another specified offence (where the defendant has a previous conviction for a specified offence),[607] the onus is on them to satisfy the court that they should be granted bail. Furthermore, the Bail Amendment Act removes the strong presumption of bail for defendants aged 17 to 19 who have received previous sentences of imprisonment.[608] Following several high-profile criminal cases involving individuals who were released on bail, the Bail Amendment Act is a direct response intended to reinforce the protection of public safety.[609]

Following the death of Christie Marceau in 2011, intense public scrutiny of the bail system became a catalyst for the amendments.[610] The Bail Amendment Act extended the list of serious violent and sexual offences for which the burden of proof was reversed (so that the defendant would have to satisfy the court that bail should be granted). The Bail Amendment Act also recognised the need to prioritise the interests of victims. While these interests were weighed against an offender's right to be presumed innocent,[611] it was ultimately decided that the reverse onus of proof did not infringe upon that right in any significant way as:[612]

> ... the accused would either be in the best position to provide information to the court on the risk they pose, or the decision would require qualitative judicial assessment of evidence.

Section 7(2) of the Bail Act was amended by s 6 of the FVAA. It states that a defendant charged with an offence for which the maximum punishment is less than three years imprisonment is bailable of right *unless* the offence is against s 194 or 194A of the Crimes Act 1961. Section 194 relates to assaults on children or an assault by a male on a female, while s 194A relates to an assault on an individual with whom the defendant is, or has been, in a family relationship. Section 8 of the Bail Act was amended by s 7 of the FVAA to insert subss (3A), (3B), and (3C). Subsection (3A) sets out the primary consideration to be considered when deciding whether a defendant charged with a family violence offence should be granted bail.

608 Section 9.
609 Judith Collins "Collins delivers on tougher bail laws" (press release, 28 August 2013).
610 Isaac Davison "Stricter bail decisions thanks to 'Christie's Law'" *The New Zealand Herald* (online ed, Auckland, 5 December 2013).
611 (2 July 2013) 691 NZPD 11518.
612 Ministry of Justice *Departmental Report for the Law and Order Committee Bail Amendment Bill* (19 September 2012) at [24].
613 Family Violence (Amendments) Act 2018, s 7.
614 New Zealand Family Violence Clearinghouse "Changes from 1 July 2019: Family Violence Act 2018 and other legislation" (21 June 2019) <https://nzfvc.org.nz>.
615 Ministry of Justice "Key Initiatives: A new Family Violence Act" <www.justice.govt.nz>.

This is "the need to protect the victim of the alleged offence and any particular person or people in a family relationship with the victim."[613] The New Zealand Family Violence Clearinghouse has stated that "the [FVA] gives decision-makers in the family violence system more guidance surrounding the nature and impact of family violence."[614] They reference the Ministry of Justice's extensive reasoning behind the FVA, which may be summarised as follows:[615]

A. to enable the family violence sector to have a more consistent response to family violence perpetrators and their victims.
B. to update the definition of family violence to better encompass its effects on the victim and their autonomy.
C. to ensure relevant government agencies and social service practitioners are better equipped to assist those harmed by family violence.
D. to make changes to Protection Orders to increase the safety of "protected people."
E. to introduce principles to guide decision-making; and
F. to increase maximum durations of Police Safety Orders and remove legal barriers to information-sharing.

A crucial part of the Ministry of Justice's reasoning behind the FVAA was to ensure that the primary consideration when courts make bail decisions is the safety of family violence victims.[616]

Zonta International, a global women's rights advocacy group, acknowledges that the amendments improved protections for victims of family violence whilst also holding perpetrators accountable.[617]

CRITICISMS OF THE 2013 AMENDMENTS TO THE BAIL ACT 2000

Since the 2013 amendments, several legal scholars and commentators have argued that the amendments erode fundamental human rights and fail to both reduce Aotearoa New Zealand's prison population and deliver justice to victims.[618] Although the reverse onus was designed to capture those who pose a risk to the public, it arguably does not succeed in doing so. Only 16 per cent of those defendants who spent time on bail offended while on bail.[619] Similarly, the most common offences on bail were property-related offences (approximately 26 per cent), traffic offences (20 per cent), and offences against justice (15 per cent).[620] Such crimes do not pose a significant risk to public safety, and these figures were established before the amendments' introduction. Similarly, no evidence suggests that a person charged with murder, Class A drug offences or specified offences pose a heightened risk to public safety. Out of 409 people charged with murder between 2004 and 2009, 156 were granted bail.[621] Of that number, only three committed a further, serious, violent offence, only one of which was murder.[622] This means that the risk of offending while on bail for those accused of murder was less than two per cent.

Frequently, the reverse onus assumes that individuals charged with an offence will also very likely be convicted of the offence. However, this is not necessarily the case. In 2017, 76 per cent of adults charged resulted in a conviction, but only 13 per cent of those convictions resulted in a custodial sentence.[623] AUT Law Professor Kris Gledhill has stated that the 2013 amendments introduced a "clear reversed burden[s] of proof that breach international human rights standards."[624]

The Bail Amendment Act purported to decrease the prison population and increase public safety. However, the evidence demonstrates that these goals have not been realised. Former Justice Minister Andrew Little expressed concern that the amendments had increased the prison population and committed to reviewing bail laws.[625] This concern is similarly expressed among law experts who have highlighted that the number of people remanded in custody has increased from 27 to 40 per cent in nine years as a proportion of the total prison population, mainly resulting from the amendments introduced by the National Government.[626]

IMPACT ON THE REMAND PRISON POPULATION

A remand prisoner is held in custody whilst awaiting trial or sentence.[627] The remand period can be spent in a range of facilities, including police cells, court cells, psychiatric facilities, and prison.[628]

As of June 2022, nearly 40 per cent of the total prison population were held on remand.[629] As of June 2021, there were a total of 2,890 male remand prisoners and 239 female remand prisoners.[630] The higher threshold for bail means greater use of remand for less serious offences and less violent crimes such as fraud.

Furthermore, those with sentences over two years now serve 77 per cent of their sentence, an increase of 20 per cent, in prison.[631] Stricter rules surrounding home detention deem various accommodation options unsuitable for electronic bail. This creates additional strain amidst a national housing shortage and when emergency and social housing are under significant pressure. While the total sentenced prisoner population has decreased, from March 2014 to March 2022, the remand prison population increased from 21 to nearly 40 per cent of the total prison population.[632] Between 2013 and 2016, there was an increase in defendants remanded in custody across a range of offences (i.e., not just for offences explicitly targeted by the Bail Amendment Act).[633]

The most significant increase in the remand prisoner rate was for robbery offences, which increased from 35.3 per cent in 2013 to 48.7 per cent in 2016.[634] The remand rate for Class A drug offences rose from 23 per cent in 2013 to 35.9 per cent in 2016.[635]

616 Ministry of Justice, above n 617.
617 ZONTA International "New Family Violence Legislation" (25 November 2018) <www.zonta.org.nz>.
618 Ministry of Justice *Regulatory Impact Statement: Bail Amendment Bill* (The Treasury, 8 May 2012).
619 At 23.
620 At 24.
621 At 8.
622 At 8.
623 Ministry of Justice *Adult Conviction and Sentencing Statistics: Data highlights for 2017.*
624 Gledhill, above n 623.
625 "Bail law changes led to prison population increase – Little" (24 February 2018) RNZ <www.rnz.co.nz>.
626 Ripu Bhatia "Bail law changes reversing burden of proof 'breached human rights' – law experts" (23 July 2020) Stuff <www.stuff.co.nz>.
627 See the definition of "remanded": Ministry of Justice "Going to Court: Glossary of Terms" <www.justice.govt.nz>.
628 Department of Corrections "Remand" <www.corrections.govt.nz>.
629 Department of Corrections "Prison facts and statistics – June 2022" <www.corrections.govt.nz>.
630 Department of Corrections "Prison facts and statistics – June 2021" <www.corrections.govt.nz>.

Finally, the remand rate for weapon offences rose from 13.4 per cent in 2013 to 25.2 per cent in 2016.[636] The growth of the remand population (a primary driver of which is an increase in time spent on remand) is projected to increase as a proportion of the total prison population.[637]

The *Justice Sector Projections 2020–2030* report released by the Ministry of Justice forecasts that remand prisoners will make up 48 per cent of the prison population or 5100 prisoners by 2030.[638] A notable decrease of 750 in the remand population was recorded between March 2020 and August 2020.[639] However, this decrease was due to the impacts of COVID-19, as there were fewer defendants remanded in custody and court events were prioritised for those in custody.[640] As of December 2021, there were 1,614 Pacific people remanded in custody.[641] One thousand five hundred thirty-six identified as Pacific men, with the remaining 78 being Pacific women. The data does not disaggregate between each Pacific ethnic group. From 2011 to 2021, the number of our offenders on remand increased by 22 per cent overall, in steady increments of around 100 to 200 persons per annum. The most common offence types are acts intended to cause injury, unlawful entry, and drug offending. Comparatively, there are 8,445 Māori remanded in custody. Between 2011 to 2021, the number of Māori remanded in custody increased by 28 per cent overall. Notably, the number of wāhine Māori sharply increased over this period by 63 per cent, compared to only 24 per cent for Māori men.

In November 2021, the average time spent on remand was 76 days.[642] The Ministry of Justice predicted that by 2031 this would increase to 91 days.[643]

This prediction has been attributed to a rise in serious crime entering the court system; an increase in people electing jury trials; later guilty pleas; and a limited capacity to appear at trial coupled with the ongoing COVID-19-related backlogs.[644] In October 2022, it was reported that an offender had spent just over five years remanded in custody — the longest remand period ever recorded.[645] As of July 2022, "32 people had been held on remand for more than two years, and five people more than three years."[646] The increase in time spent on remand reflected in wait times for criminal trials: "As of December 2021, the average wait time for a criminal trial to be heard in the High Court was 487 days."[647] According to Dr Ian Lambie, the 2013 amendments likely contributed to an increase in the remand population.[648] Outside of the direct effect of making bail more difficult for serious offenders to access, he argues that the increased difficulty in getting them bail had a "flow-on effect on the decision-makers' risk appetite", affecting the remand rate for defendants charged with offences that are not explicitly identified in the legislation.[649]

631 Ministry of Justice, above n 620.
632 Department of Corrections "Prison facts and statistics – March 2014" <www.corrections.govt.nz>; and Department of Corrections "Prison facts and statistics – March 2022" <www.corrections.govt.nz>.
633 Letter from Anton Youngman (General Manager of Sector Insights) to Kate McIntyre (Requestor) regarding "Official Information Act Request: Bail Amendment Act 2013" (6 May 2019) OIA 74676 (obtained under Official Information Act 1982 request to the Ministry of Justice).
634 At [9].
635 At [10].
636 At [9].
637 Ministry of Justice *Justice Sector Projections 2020–2030* at 20.
638 At 20.
639 At 10.

1 — Services Available to Remand Prisoners

The Corrections Regulations 2005 state that every remand prisoner has the right to at least the same standard of treatment as a sentenced prisoner.[650] Additionally, the treatment of remand prisoners must be considerate of their safety and security needs.[651] A core difference in the services available to remand and sentenced prisoners appears to be the programmes that remand prisoners have access to and the comprehensiveness and detail in the offender plans developed by prison Case Managers. An Ombudsman's Report highlights that recreational and educational activities for remand prisoners are often heavily influenced by their specific placement within prison.[652] The unit each remand prisoner is placed in can severely limit their access to short courses and educational activities.[653]

For instance, in Auckland Prison, remand prisoners who were housed in maximum-security units were subject to more extended periods of detainment within their cells and were unable to access specific courses or places like the prison library.[654] The Ombudsman's Report expressed concern that remand prisoners were given little or no opportunity to constructively use their prison time or even to tackle rehabilitation, as staff/room shortages often led to the cancellation of courses, classes and activities.[655]

Nonetheless, remand prisoners should have access to prison programmes, particularly those that target basic life skills. Auckland Prison, for instance, ran numerous activities for remand prisoners from January 2020, including a Tikanga programme, Art Studio Workshops, Ongoing Intensive Numeracy and Literacy classes, a Life 101 life skills programme, and Parenting Programmes.[656] Despite not being found guilty, some remand prisoners do not have access to the same services as sentenced prisoners. Accordingly, some remand prisoners are unable to receive assistance for drug and mental health problems while they are in custody.[657]

2 — Rehabilitation and Treatment Programmes

The perceived temporary or short-term nature of prison stays for remand prisoners means that they do not have access to the rehabilitation programmes that sentenced

640 At 10.
641 Statistics New Zealand "Annual remand Prisoner Population for the latest Calendar Years" <https://nzdotstat.stats.govt.nz>.
642 Ministry of Justice *Justice Sector Projections 2021–2031* at 9.
643 At 9.
644 At 9.
645 Emma Hatton "Five years on remand: Justice system breaks its own record" (updated 11 October 2022) Newsroom <www.newsroom.co.nz>.
646 Hatton, above n 647.
647 Hatton, above n 647.
648 Ian Lambie *Using evidence to build a better justice system: The challenge of rising prison costs* (Office of the Prime Minister's Chief Science Advisor, March 2018) at [27].
649 Ian Lambie and Olivia Hyland "The opportunity of a lifetime" [2019] NZLJ 220 at 221.
650 Corrections Regulations 2005, reg 185(1).
651 Regulation 185(2).
652 Peter Boshier *OPCAT Report: Final Report on an unannounced inspection of Auckland Prison under the Crimes of Torture Act 1989* (Office of the Ombudsman, December 2020) at 50.
653 At 50.
654 At 50–51.
655 At 50–51.
656 At 52.

prisoners have. This is problematic given the extended period that remand prisoners can spend in prison, particularly those who may end up serving one or more years and/or their entire sentence on remand.[658] Remand prisoners who are eventually convicted experience a delay in the start of their rehabilitation programme, increasing the risk that they may be released before they have had the chance to adequately identify and deal with the root cause(s) of their offending.[659]

The lack of access to rehabilitation significantly increases the likelihood of a remand prisoner reoffending upon their release.[660]

Additionally, the absence of rehabilitation programmes for remand prisoners is particularly concerning given the high rates of mental illness among remand prisoners.[661] Even a short length of time spent as a remand prisoner can detrimentally impact their mental and emotional well-being. Remand prisoners also do not have access to complete treatment programmes that can target mental illness.[662] While prisons generally offer drug and alcohol treatment programmes, remand prisoners may not spend enough time in prison to complete these.[663] This makes remand prisoners especially vulnerable to becoming institutionalised or further damaged whilst in prison.[664]

3 — Case Managers for Remand Prisoners

Sentenced offenders are generally assigned a Case Manager and Case Officer upon entering prison. Remand prisoners may be assigned a Case Manager if they remain in remand for extended periods or are likely to receive a longer prison sentence. Case Managers work directly with sentenced prisoners to provide them with support to set and achieve targeted goals, which are often aimed at identifying and confronting the effects and underlying causes of their offending.[665] For remand prisoners, Case Managers provide a similar avenue of support, facilitating access to services which are intended to help them transition back into the community.[666]

However, Case Managers for sentenced prisoners provide more aid in developing a detailed or comprehensive rehabilitation and reintegration plan. This plan is generally a phased offender plan that seeks to accurately pinpoint the needs and risks of each sentenced prisoner.[667] Although Case Managers still aid remand prisoners with management and reintegration plans, such plans are far less detailed than those for sentenced prisoners. Unlike sentenced prisoners, Case Managers will emphasise aiding remand prisoners with reintegrating into the community upon their release from prison (as opposed to addressing the causes of offending), providing support for addiction, finding accommodation, and seeking parenting programmes.[668]

657 Gledhill, above n 623.
658 Ministry of Justice *Justice Sector Prison Population Projections 2019–2029* at 12.
659 At 12.
660 At 12.
661 Jeremy Skipworth and Warren Brookbanks "New justice system responses to mentally impaired defendants in New Zealand" (2022) 29 Psychiatry, Psychology and Law 549 at 550.
662 Lisa W Lunt *Preserving the Dignity of the Mentally Unwell: Therapeutic Opportunities for the Criminal Courts of New Zealand* (Fulbright New Zealand, August 2017) at 14.
663 At 14.
664 At 14.
665 Greg Newbold "Another One Bites the Dust: Recent Initiatives in Correctional Reform in New Zealand" (2008) 41 Australian and New Zealand Journal of Criminology 384 at 387.

Case Managers can also aid remand prisoners by pinpointing specific areas of concern (e.g., parenting, financial management, and basic living skills) to work on while in prison.[669] However, the continuously rising remand population has meant that Case Manager challenges have emerged, particularly in already understaffed prisons. A 2020 Ombudsman Report of Auckland Prison highlighted the pressure caused by the increase in remand prisoners.[670] Case managers at Auckland Prison stated that there were insubstantial opportunities to engage with prisoners directly. Furthermore, unlike sentenced prisoners who receive consistent updates from Case Managers during their sentence, remand prisoners can occasionally be "unallocated" from a Case Manager's caseload.[671]

In Auckland Prison, staff shortages meant that Case Managers were balancing approximately ten remand prisoners and up to 40 sentenced prisoners.[672] In order to ease the workload for Case Managers, upon completing an initial needs assessment, remand prisoners would find themselves unallocated and thus no longer provided with a direct point of contact for inquiries regarding their case, regular reviews, and end-to-end case management.[673]

4 — Remand Prisoners Housing Separate from Sentenced Prisoners

Generally, remand prisoners are required to be housed separately from sentenced prisoners (based on the rationale of protecting those found guilty of an offence from those who have not been).[674] Upon entering prison, remand prisoners will be assessed and processed and then assigned immediately into specific remand units that are separate from the housing blocks for sentenced prisoners.[675] In exceptional circumstances, the Chief Executive can approve the mix of remand and sentenced prisoners.[676] Concerns have been raised with the treatment and housing of remand prisoners, in particular by the United Nations Subcommittee on Prevention of Torture, which visited numerous prisons across the country.[677] The subcommittee's 2014 report outlined grave concerns regarding the prolonged detainment of remand prisoners and highlighted instances of remand prisoners being detained for up to 19 hours each day. This meant they were unable to access exercise facilities and experienced a delay in obtaining medical assistance.[678]

5 — Impacts of Covid-19 on the remand prisoner population

The COVID-19 pandemic and its associated restrictions have caused significant disruption to the court system. Jury trials were suspended in early 2020, and during Alert

666 Department of Corrections "Case management and planning" <www.corrections.govt.nz>.
667 Department of Corrections, above n 668.
668 Department of Corrections, above n 668.
669 Department of Corrections, above n 630.
670 Boshier, above n 655, at 2.
671 At 64.
672 At 63–64.
673 At 64.
674 Corrections Regulations, reg 186(1).
675 Department of Corrections "Arriving in prison" <www.corrections.govt.nz>.
676 Corrections Regulations, reg 186(3).
677 United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment *Report on the visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment to New Zealand* UN Doc CAT/OP/NZL/1 (28 July 2014).
678 At 7.

Levels 3 and 4 in 2021, existing delays and case backlogs were exacerbated.[679] Between March and July 2020, a significant number of jury trials were deferred, including 430 at the District Court and 49 at the High Court.[680] This was mirrored during the Delta lockdown between August and December 2021, where over 537 District Court jury trials were deferred and 29 at the High Court.[681] Furthermore, during Alert Levels 3 and 4 in 2020, civil trials were not held at the District Court, while only shorter civil matters continued to operate remotely at the High Court.[682]

The pandemic's impact on delay is particularly problematic for remand prisoners awaiting trial or sentencing. In 2020 and 2021, fewer individuals entered the prison system due to pandemic restrictions and recent initiatives that introduced more non-custodial sentences to decrease the remand rate. These factors contributed to a 20 per cent decrease in the remand population, dropping from 3,613 remand prisoners in December 2019 to 2,908 remand prisoners in late December 2021.[683]

However, while the number of remand prisoners has dropped slightly over the course of the pandemic, the amount of time spent on remand continues to rise.[684] Remand terms have increased steadily over the years, even prior to the pandemic. This is due to a range of factors, including an increase in late guilty pleas, subsequent court hearings, an increase in time between hearings, and court adjournments.[685]

WAITANGI TRIBUNAL CLAIM

In September 2020, Māori justice advocate Awatea Mita lodged a claim with the Waitangi Tribunal alleging that the Bail Amendment Act was in breach of Te Tiriti and that "Māori will suffer the disproportionate burden of this [remand] crisis."[686] The claim identifies that the amendments were a significant driver to the increase of the remand prison population from 27 per cent (pre-2013) to 40 per cent (2020) and that Māori have been disproportionality impacted as a result.

Specifically:[687]

> The claim alleges that the law change failed to actively protect Māori citizenship rights contained within the New Zealand Bill of Rights and international laws, including the right not to be arbitrarily detained, the right to be presumed innocent until proven guilty, and the right to be released on reasonable terms and conditions unless there is just cause for continued detention. Mita said the legislation also failed to actively protect Māori interests by subjecting Māori to unnecessary remand stints, and that the Crown failed to exercise good government in developing the Act.

679 Chief Justice of New Zealand, above n 515, at 33.
680 At 33.
681 At 33.
682 At 33.
683 At 32.
684 At 32.
685 Ministry of Justice, above n 644, at 8.
686 Laura Walters "Waitangi Tribunal claim alleges laws breach Te Tiriti" (updated 23 November 2020) Newsroom <www.newsroom.co.nz>.
687 Walters, above n 690.

Mita, who was formerly incarcerated in 2013 on a non-violent drugs charge, penned an incisive and sobering op-ed about her experiences in prison in the hopes of raising awareness of the remand crisis for wāhine Māori.[688]

Her subsequent claim draws on her lived experience to describe "the normalisation of violence in prisons, and the impacts imprisonment and remand have on a person's likelihood of successful reintegration versus recidivism."[689] We were unable to locate any information about the claim's status.

Restorative and Youth Justice

While the justice system is, by and large, a retributive and adversarial system, restorative justice (RJ) is an alternative "system or practice which emphasises the healing of wounds suffered by victims, offenders, and communities that are caused or revealed by offending conduct", whereby the relevant parties meet to collectively resolve the effects of criminal conduct to repair the harm caused.[690] Since the late 1990s, various RJ practices have been integrated into the formal justice system and are widely considered effective in reducing recidivism. However, a dearth of intersectional scholarship focuses on Pacific experiences with RJ. Helena Kaho's article on FGCs is one of only a handful of papers that provide a critique of RJ processes (in that case, FGCs) from a Pacific perspective.[691]

Kaho argues that although the FGC process established under the Children, Young Persons, and Their Families Act 1989 (CYPFA) better acknowledges ethnic minority values and customs, it nevertheless is oriented around Western assumptions of justice that are incongruous with Tongan socio-political views.[692]

The CYPFA — now renamed the Oranga Tamariki Act 1989 or the Children's and Young People's Well-being Act 1989 — established the FGC. The FGC is a post-offence reconciliation process that involves a young offender, their family, the victim, the police, and youth justice representatives.[693] Why is the FGC process considered "Restorative Justice"? In legislating for this "ground-breaking" process, New Zealand's Parliament had responded to two roughly contemporaneous thought developments.

The first was recognising that youth justice legislation needed to accommodate more ethnically diverse needs. The Māori Perspective Advisory Committee's 1988 report *Puao-Te-Ata-Tu* (*Day Break*) epitomised this development.[694] Set up to ascertain Māori views on youth justice, the report concluded that the youth justice system was monocultural, built entirely on Western values and ideas.[695] The Committee suggested the enactment of new youth justice legislation that was centred on Māori customs and values.[696] The CYPFA did so by conceptualising children as part of a wider whānau or family

688 Awatea Mita "These are the women's stories at the heart of a crisis in criminal justice" (3 July 2020) The Spinoff <https://thespinoff.co.nz>.
689 Walters, above n 690.
690 Donald J Schmid "Restorative Justice: A New Paradigm for Criminal Justice Policy" (2002) 34 VUWLR 91 at 91.
691 Helena Kaho "The Family Group Conference: A Tongan Perspective" [2016] NZ L Rev 687.
692 At 702.
693 At 688.
694 Maori Perspective Advisory Committee *Puao-Te-Ata-Tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988).

group, better reflecting Māori and Pacific collectivist ideas.[697] The CYPFA also mandated traditional Māori dispute resolution customs such as opening with karakia and consensus decision-making.[698]

The second development was the international trend towards viewing children as rights-bearers.[699] This development culminated in the United Nations Convention on the Rights of the Child in 1989.[700] Article 12 contained one of the fundamental rights: the right for a child to express their view and for that view to have weight.[701] Although the FGC was designed to acknowledge the culturally diverse views on the role of the child and the family in youth justice processes, Kaho uses a Tongan perspective to show that at a deeper level, the FGC process clashes with minority cultural values and ideas.[702] In sum, three key assumptions underlying the FGC process are incongruous with Tongan views of family life. They are:[703]

1. The child should participate in the FGC process.
2. The child must be held individually accountable for their actions.
3. The child's voice must be given weight.

Moreover, the work of Samoan social scientist Tamasailau Sua'ali'i-Sauni, whilst not strictly legal in scope, has explored the experiences of Samoan youth and their families in the youth justice context both in Aotearoa New Zealand and internationally.[704]

Sua'ali'i-Sauni's dissertation, "Le Matuamoepo: Competing 'Spirits of Governing' and the Management of New Zealand-Based Samoan Youth Offender Cases", highlights that understanding the complexities of managing Samoan youth offenders is not just a question of knowing what "spirits of governing" are at play, but also examining how they play.[705] Sua'ali'i-Sauni identifies three spirits of governing — neo-liberal risk management, cultural appropriateness and fa'a Samoa — and demonstrates how these spirits working together can provide an "understanding of the governmental conditions under which the management of New Zealand-based Samoan youth offending occurs."[706]

Recently, Sua'ali'i-Sauni, Juan Tauri and Robert Webb received a three-year Marsden Fund grant administered by the New Zealand Royal Society Te Apārangi to research how Māori and Samoan young people and their whānau/aiga interact with and make

695 Kaho, above 696, at 695.
696 At 696.
697 At 698.
698 At 698.
699 At 696.
700 At 697.
701 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 12.
702 Kaho, above n 696, at 712.
703 Kaho, above n 696 at 719.
704 See, for example, Tamasailau M Suaalii-Sauni "Le Matuamoepo: Competing 'Spirits of Governing' and the Management of New Zealand-Based Samoan Youth Offender Cases" (PhD Dissertation, University of Auckland, 2006); Tamasailau M Suaalii-Sauni "New Zealand-Based Samoan Youth Offender Subjectivities: Working the 'Spaces Between'" in Michael O'Loughlin and Richard T Johnson (eds) *Imagining Children Otherwise: Theoretical and Critical Perspectives on Childhood Subjectivity* (Peter Lang, New York, 2010) 87; Tamasailau Suaalii-Sauni, Juan Tauri and Robert Webb "Exploring Māori and Samoan youth justice: Aims of an international research study" (2018) 5 Journal of Applied Youth Studies 29; and Robert Webb and others "Building understandings of Māori and Samoan experiences of youth justice: Navigating beyond the limits of official statistics" (2022) 37 New Zealand Sociology 70.

sense of, youth justice systems across three settler-colonies: Aotearoa New Zealand, Australia and the United States.[707] The project is the first significant, independent and empirical study of its kind and privileges the lived experiences of these groups to "inform contemporary readings of indigeneity, ethnicity and culture in youth justice for youth justice policymaking."[708] An overview of the research identifies the "proportionally significant over-representation of Māori and Pasifika youth" in the youth justice system, with offending rates for young people aged 14 to 16 years at 642 per 10,000 for Māori, and 256 per 10,000 for Pacific.[709]

A companion article was published in 2022, titled "Building understandings of Māori and Samoan experiences of youth justice: Navigating beyond the limits of official statistics", exploring how youth justice is framed in "the official record" against how the communities themselves interpret it.[710] The authors found that while official records show an overall decline in the number of distinct youth offenders between 2009 and 2020, the proportion of Māori and Pacific peoples in this group has remained relatively stable over that period.[711] For example, of the 6,881 distinct offenders in 2019/2020, 44 per cent were Māori, and six per cent were Pacific peoples.[712] Of the young people who engaged in an FGC or court action, 40 per cent were Māori, and 30 per cent were Pacific.[713] Of those aged 12 to 17 that appeared in the Youth Court, 33 per cent were Māori, and 36 per cent were Pacific. On average, only 20 to 30 per cent of young people apprehended by police appear in the Youth Court.[714] The authors found:[715]

> [A] greater number of both Māori and Pacific peoples are being brought into the court process and being charged, supporting the notion that Māori and Pacific peoples face more serious outcomes.

In speaking to the communities, participants commented on the "monoculturalism" of the justice system, police bias, negative portrayals of communities in official records, scepticism toward using Indigenous concepts within the justice system and cultural tokenism.[716] Participants also spoke to their desire for community-based justice programmes and collective accountability. In conclusion:[717]

> The narratives excerpted here speak to the idea that Māori and Samoan communities are not simply the passive recipients of state interventions and that they can challenge the monoculturalism of the justice system. Māori and Pacific non-governmental organisations and groups have made significant contributions to

705 Suaalii-Sauni "Le Matuamoepo", above n 708, at 1.
706 At 263.
707 Suaalii-Sauni, Tauri and Webb, above n 708.
708 At 38.
709 At 30.
710 Webb and others, above n 708, at 70.
711 At 73.
712 At 74.
713 At 74.
714 At 74.
715 At 74.
716 At 84–85.

> building community-based responses to offending and victimisation and, as these narratives note, they are actively working towards community and youth advancement and development. Overall, these narratives speak to the aim of decolonising state justice through community empowerment, and the prioritisation of Indigenous values and voices in this endeavour.

In 2019, Tracy Williams and Julia Ioane tracked the rates of victim participation in FGCs within a six-month pilot project between police, Oranga Tamariki and Victim Support.[718] The pilot project was formed in response to the Ministry of Justice's *Youth crime action plan 2013–2023 Report* to improve FGCs and increase victim participation.[719] The collaborative approach between the aforementioned agencies deviated from the standard FGC practice whereby referrals went from police to Oranga Tamariki and excluded victim support.

As an evaluative study, the research focussed on exploring the process of inter-agency collaboration as opposed to assessing the outcomes of each FGC. The researchers adopted a mixed methods-approach of qualitative data from semi-structured interviews and quantitative data about victim participation.[720] The ethnic identities of participants were not recorded due to privacy reasons; however, given the disproportionately high number of our young people navigating the youth justice system, the findings are directly relevant to this research.

A thematic analysis of the qualitative data was broken down into agency processes and systems, information, and timing. On the first theme, participants said that they felt more training was needed by frontline police and between agencies for the FGC to run more smoothly and that, for collaboration to succeed, processes needed to be streamlined. They also highlighted the lack of adequate resources for additional streamlining and training to occur.[721] On the theme of information, participants commented on how complex the youth justice process can be (for both victims and professionals), the risk of re-traumatising victims if the FGC is convened too late, that FGCs "appeared to be nothing more than tick-box approaches that were offender-focused", the importance of victim support and preparation prior to the FGC and ensuring that their feedback was adequately considered.[722]

Regarding timing, participants said they were concerned about the slow flow of referrals during the pilot, that more time was needed for the pilot, and that FGC timeframes could compromise victim engagement.

717 At 88.
718 Tracy Williams and Julia Ioane "'They feel like it's all based around the offender': Professionals explore how victim participation in family group conferences can be enhanced" (2021) 33 Aotearoa New Zealand Social Work 66.
719 At 68.
720 At 69.
721 At 70.
722 At 72.
723 At 73.
724 At 73.
725 At 73.
726 At 73.
727 At 74.
728 At 74.
729 At 75.

As one participant (professional) stated:[723]

> One of the other, I guess, challenges is our timeframes. When something comes from court, especially if the young person is in custody, we have got, you know, a week to organise the FGC and then a week to hold it. So, when that means adding in, or finding out who the [Victim] Support worker is, contacting them and adding on that extra person to the process, when we are already having to contact all the, like the police, the lawyers, the family, all these other people, it is a bit tricky.

For the quantitative findings, the research found that, prior to the pilot, victim participation was low (15.4 per cent).[724] During the pilot, participation leapt to 100 per cent, remaining high throughout the six months.[725] Submission was the most common mode of victim participation as opposed to appearing in person.[726] When coordinators supported victims to be well-prepared, there was a greater opportunity for restorative healing effects.[727] Participants also emphasised the importance of cultural support to ensure they could "speak or write in their languages, with professional interpretation as required, which aligns with calls that cultural appropriateness should be implemented in international best-practice FGC guidelines."[728]

Notably, the authors found that through the pilot process, participant awareness about the utility of FGCs was enhanced; where some came into the pilot with the view that FGCS are "nothing more than tick-box approaches" that are solely offender-focused, through the pilot "they were aware of a need to be focused on collective outcomes at the FGC—that both offenders and victims benefit from the process."[729] Finally, the authors made the following recommendations (summarised):[730]

1. Intensive and enhanced training: To achieve high-quality FGCs, well-trained and skilled professionals are needed. Dedicated, in-depth training is required across the pilot process and the wider FGC system to ensure smoother processing. The authors observed that this was especially required during the start-up phase, with participants identifying that professional staff needed better training preceding the pilot.
2. Targeted training for frontline police officers: Participants identified issues with front-line police processes as compromising the overall quality of the FGC. When officers are trained and informed, referrals can be processed expeditiously, allowing participants to prepare and engage with the FGC fully. The authors suggest that this recommendation could be met by enhancing the channels of communication between Police Youth Aid Officers and professionals who are responsible for co-ordinating the FGC.
3. More streamlined processes within the FGC system: Participant knowledge of each agency's systems and processes would enhance collaboration as "the efficacy of any FGC relies on the involved professionals aligning their perspectives." Participants observed that when processes lacked cohesion, this had a flow-on effect, with participants "feeling the added pressure that came from the pilot project", affecting their active engagement.
4. Information systems need improvement: Youth justice processes are com-

plex, with current information systems failing to meet participant needs. Participants identified the disproportionate ratio of offenders to victims and the administrative burden this places on professional staff who are not adequately resourced. Investing in better information systems allows participant ratios (both victim and offender) to be clearly identified, correct family information recorded, and contact times made faster.

Participants also made several practical suggestions including increasing the number of Youth Aid officers to communicate with frontline police, holding regular refresher training for key parties/stakeholders, and greater information sharing/transparency between agencies about each other's processes to ensure they are streamlined. While the authors acknowledge that in-person victim participation is the suggested "gold standard", this is not always reasonable or possible in every case (especially where the offending is of a violent or sexual nature).[731] They propose that more research is needed to understand better why most victims prefer the submission model and whether the lack of in-person attendance could be attributed to systemic and organisational barriers.[732]

Sentencing

The approach to sentencing in Aotearoa New Zealand is governed by the Sentencing Act 2002, which requires the judge to balance several considerations, including the seriousness of the offending, the victim's interests, consistency with sentences imposed for similar offending, and the personal circumstances of the offender. Various sections of the Sentencing Act set out the guiding purposes, principles and factors a judge must consider when determining the appropriate sentence. There are eight types of sentences a convicted offender can receive:

A. Prison
B. Preventive detention
C. Home detention
D. Community detention
E. Supervision
F. Intensive supervision
G. Community work
H. Fines or reparation orders

Analysis of sentencing trends from 2002 to 2007 found that, since the introduction of the Sentencing Act, the prison population had risen by 40 per cent despite declining

730 At 75–76.
731 At 76.
732 At 78.
733 Tara Oakley "A Critical Analysis of Section 27 of the Sentencing Act (2002)" (MA Thesis, University of Waikato, 2020) at 46; and see Newbold, above n 667, at 384.
734 Oakley, above n 737, at 46.

crime rates.[733] Legal scholar Tara Oakley contends that the Sentencing Act "was introduced [at a] time of penal populism and a discursive demand for punitive legislation and intervention … emphasising the offender's accountability for harm to both the victim and community."[734]

A snapshot of sentencing trends for Pacific people shows that from 2002 to 2009, the total number of sentences received increased by 56 per cent.[735] However, between 2009 and 2019, the number of adults convicted of a crime decreased by that same percentage.[736] Between 2020 and 2021, 48 per cent of sentences were community-based, followed by monetary fines and imprisonment.[737]

Our assessment of Ministry of Justice records from the 1980s reveals the following sentencing trends:[738]

A. There has been a steady increase in the total number of sentences, including prison sentences, given to us (accounting for population increases), stabilising in 2009.
B. Since 2009/2010, there has been a steady decline in all sentences. This fell by more than half between 2009–2019.
C. There have been significant decreases in sentences given to us for robbery, extortion and related offences, unlawful entry with intent/burglary, breaking and entering, theft and related offences since 2009/2010.

The data would suggest that we are, on average, receiving less punitive sentences. This is largely reflective of broader justice trends where, since 2018, the total prison population has decreased by more than 25 per cent.[739]

RESEARCH ON ETHNICITY AND SENTENCING IN NEW ZEALAND

There is a considerable body of international scholarship on the interrelationship between race/ethnicity and sentencing, specifically on racial discrimination in the sentencing. Much of this focuses on the correlation between the type of sentence imposed (e.g., imprisonment), the sentence length and the offender's ethnicity. Morrison's *Identifying and Responding to Bias in the Criminal Justice system* report comments on the mixed results from research undertaken over the last two decades; while several scholars found that "certain ethnic-minority groups are generally treated more punitively at sentencing in comparison to ethnic majority defendants", other studies claimed to find "little evidence of racial discrimination in sentencing practices once legally relevant factors and other demographic variables are controlled."[740] Few local studies undertake a qualitative analysis of ethnicity and sentencing outcomes with a critical discussion of localised sentencing practices.

735 Statistics New Zealand "Adults convicted in court by sentence type – most serious offence calendar year" <https://nzdotstat.stats.govt.nz>.
736 Statistics New Zealand, above n 739.
737 Statistics New Zealand, above n 739
738 Statistics New Zealand, above n 739
739 Ministry of Justice *Justice Sector Public Consultation: Focus on Imprisonment in Aotearoa* (3 June 2022) at 8.
740 Morrison, above n 226, at 45.
741 Sue Triggs *Sentencing in New Zealand: a statistical analysis* (Ministry of Justice, June 1999).

To date, the most comprehensive multivariate analysis of sentencing in Aotearoa New Zealand is the 1999 Ministry of Justice report *Sentencing in New Zealand: a statistical analysis* by Sue Triggs.[741] Although the report's primary objective was to quantify the relative effect of various statistical factors on current and past sentencing practices, it also identified the factors influencing community-based sentences as alternatives to imprisonment.[742]

Triggs found that Māori and Pacific offenders were more likely to receive periodic detention, community programmes or community service than Pākehā offenders but less likely to receive a monetary penalty (fine). Notably, the report found that:[743]

> The use of imprisonment did not differ between ethnic groups, once other factors had been taken into account (such as the difference between ethnic groups in the seriousness of offences committed and extent of previous offending).

This finding is difficult to square with the data that shows that, since 1971, Māori have made up 40 per cent of the prison population, increasing to 51 per cent of the prison population by 2011.[744] A 2018 Ministry of Justice report revealed that Māori are eleven times more likely to face prison once convicted, leading Associate Justice Minister Aupito William Sio to comment that: "The [justice] system by its nature, by its very hardcore nature, over many, many decades, seems to condemn Māori more than any other race in New Zealand."[745]

> These are people that have caused terrible harms to other people, but I have yet to come across someone in that offending group that has not had horrific harms perpetrated on them too. The total *Once Were Warriors* background; that would be the standard story I hear from an offender, even if they're being sentenced for burglary.
> — Khylee Quince, Dean of AUT Law, on s 27 reports for Māori offenders.[746]

Under s 27 of the Sentencing Act, an offender may submit information to the court about their personal, family, whānau, community and cultural background to the court. Section 27 is a "potentially powerful tool in a defence counsel's arsenal", though up until recently, it has been one of the most under-utilised sections of the Sentencing Act.[747]

The legislative history is essential given that:[748]

> Section 27 was implemented with the aim of enhancing the effectiveness of the judicial system's acknowledgement and response to the cultural needs of Māori so as to effect positive change in the rate of Māori imprisonment.

742 At 15.
743 At 18.
744 Peter Clayworth "Prisons - Māori imprisonment" (20 June 2012) Te Ara - the Encyclopedia of New Zealand <www.teara.govt.nz>.
745 "Māori 11 times more likely to face prison – report" (19 April 2018) RNZ <www.rnz.co.nz>.
746 Anneke Smith "Judges ordered cultural reports 'in error'" (6 May 2019) RNZ <www.rnz.co.nz> (emphasis in original).

On 1 October 1985, the Criminal Justice Act 1985 (CJA) was enacted. Prior to its enactment, the Department of Justice submitted a memorandum to the Statutes Revision Committee noting the disproportionately high rates of incarceration for Māori and advising that the Bill required "a clear provision for the court to access the cultural background and personal circumstances of the offender through a community representative."[749] From this, cl 14A (later s 16 of the CJA) was inserted into the Criminal Justice Bill. During its second reading, then Minister of Justice Geoffrey Palmer stated:[750]

> Clause 14A is an important new provision that allows offenders appearing before a court for sentence to call a person to speak to the court about the offender's ethnic or cultural background, and on the way in which that background relates to the offence or may assist in the prevention of reoffending by the offender. The court is obliged to hear any person called by the offender unless it is satisfied that for some special reason it would not be of assistance to hear that person. The purpose of the new provision is to secure the cooperation of ethnic minorities that at present experience high rates of imprisonment in seeking ways of finding alternatives to imprisonment. Clause 14A has been framed to apply generally to persons of all races to avoid any argument that it favours some racial groups at the expense of others.

Section 16 of the CJA as enacted said:

> 16. Offender may call witnesses as to cultural and family background—
>
> 1. Where an offender appears before any court for sentence, the offender may request the court to hear any person called by the offender to speak to any of the matters specified in subsection (2) of this section; and the court shall hear that person unless it is satisfied that, because the penalty that may be imposed is fixed by law or for any other special reason, it would not be of assistance to hear that person.
> 2. The matters to which any person may be called to speak under subsection (1) of this section are, broadly, the ethnic or cultural background of the offender, the way in which that background may relate to the commission of the offence, and the positive effects that background may have in helping to avoid further offending.

Although the wording of subs (2) was facially neutral, Oakley notes that it was written specifically with Māori in mind.[751]

747 Stephen O'Driscoll "A powerful mitigating tool?" [2012] NZLJ 358 at 358.
748 Oakley, above n 737, at 1. See also Gregory Burt "What About the Wāhine? Can An Alternative Sentencing Practice Reduce the Rate That Māori Women Fill Out Prisons? An Argument For the Implementation of Indigenous Sentencing Courts in New Zealand" (2011) 19 Wai L Rev 218.
749 Oakley, above n 737, at 42.
750 (23 July 1985) 464 NZPD 5834.
751 Oakley, above n 737, at 43.

Following its enactment, from 1986 to 1987, the use of s 16 in sentencing decisions was monitored across eight District Courts, revealing that only two courts had used s 16 from 19 cases. In respect of sentences involving Māori and Pacific offenders, this correlated to 0.25 per cent of cases.[752] The low uptake of s 16 continued into the 1990s, with many scholars citing a lack of awareness and professional resistance for its low uptake. In 2000, the Ministry of Justice published a report on s 16 exploring its use, impact, and probable causes for its underuse.[753]

The report found, acknowledging the reasons set out above, that when s 16 was effectively used, it could improve the sentencing process and outcome(s) for the offender.[754] While s 27 of the Sentencing Act does not explicitly require a written report, it is common for the court to "hear" about an offender's personal, family, whānau, community or cultural background through a written document (sometimes referred to as a "cultural report"). Since 2018, there has been a significant uptake in s 27 report requests.[755] We cite two interrelated reasons for this. In the *New Zealand District Courts Annual Report 2018*, Chief District Court Judge Jan-Marie Doogue urged Courts to take "a more comprehensive approach to inform sentencing decisions using cultural reports under s 27 of the Sentencing Act 2002."[756] The second was the landmark High Court decision of *Solicitor-General v Heta*, where Whata J upheld a discount of 30 per cent awarded by Judge Moala for Ms Heta's circumstances described in her s 27 report.[757]

Although s 27 (and its s 16 progeny) has been available for more than three decades, *Heta* demonstrates that, when used effectively, a s 27 report can significantly impact the sentencing outcome. As Te Ahi Kaa New Zealand Association of Counsellors spokesperson Gay Puketapu-Andrew opines:[758]

> I think about the writings of someone like Moana Jackson, which has highlighted the importance of cultural identity, and the prevalence of Māori in the justice system who do not have a good sense of their cultural identity and who, in fact, have a sense of disconnection. …That contributes to the offending they involve themselves in, and it's really important to understand when a court is looking to sentence someone. If we are talking about recidivism and wanting to prevent that from continuing, then surely it's important to understand what is behind the behaviours that have put the people in the system.

Oliver Fredrickson has published several articles in the Māori Law Review about the role of s 27 reports in sentencing. While commending the increased use of s 27 more recently, Fredrickson draws attention to the increasingly inconsistent approach by the senior courts and how they approach the issue of systemic deprivation.[759] Fredrickson explains:

752 At 45.
753 Alison Chetwin, Tony Waldegrave and Kiri Simonsen *Speaking about cultural background at sentencing: Section 16 of the Criminal Justice Act 1985* (Ministry of Justice, November 2000).
754 Chetwin, Waldegrave and Simonsen, above n 757.
755 Tracey Cormack "Cultural background report process underutilised" (2018) 920 LawTalk 60.
756 Ministry of Justice *Annual Report 2018: District Court of New Zealand – Te Kōti ā Rohe* (2018) at 8 as cited in Oakley, above n 737, at 58.
757 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [67].
758 Marty Sharpe "Large increase in number and cost of cultural reports for offenders" (8 March 2021) Stuff <www.stuff.co.nz>.

> [A]lthough it is clear that a "causal nexus" is necessary between the systemic deprivation and the offending, the extent to which judges are willing to critically engage with a s 27 report has not been consistent. Some judges have been willing to draw inferences to find a causal nexus while others have stressed that "many people with disadvantaged backgrounds do not commit criminal offences."

The emphasised quotation is taken directly from Downs J's decision in *R v Patangata* where his Honour opined that "excessive discounts" for systemic disadvantage risked undermining the justice system's core principles of choice and agency.[760] In that case, Ms Patangata was convicted of manslaughter for stabbing her partner during a domestic violence incident. Ms Patangata's s 27 report discussed a childhood "marred by an environment that promoted alcohol, drugs, violence and gang affiliation" as well as exposure to domestic violence in two previous relationships.[761] His Honour considered that these factors, when taken together, "perhaps provided a very broad explanation" for her offending but were not causative in respect of her choice to offend.[762] A ten per cent discount was awarded "largely because of Ms Patangata's age and potential."[763] Fredrickson argues that while Downs J's comments are factually true, in that not all those from disadvantaged backgrounds offend, such logic risks decontextualising the impact of systemic deprivation upon an individual's "choices."[764] As stated by Whata J in *Heta*, the "recognition of deprivation and personal trauma does not involve condoning the offending. Rather it helps to explain it."[765]

Section 27 discounts are not limited to cases where the offender's experience of cultural and/or systemic deprivation is established as being causative of their offending.

As per Judge Hinton's decision in *Su'e v R*, the Court acknowledged that "s 27 reports are also relevant to sentencing where aspects of an offender's personal and cultural background other than cultural deprivation are relevant to their commission of an offence."[766] In this aggravated robbery case, a s 27 report was used to provide insight into Mr Su'e's upbringing, detailing his experience of intense bullying and how this contributed to feelings of inadequacy vis-à-vis the cultural expectations placed on Samoan men within the family unit and wider community.[767]

The report discussed the link between Mr Su'e's experiences mentioned above and the anti-social behaviour which led to his offending, which counsel used to establish causation successfully. As a result, a s 27 discount was awarded. As emphasised in *Heta*, it is insufficient for a report to relay the offender's background; a nexus must be drawn correlating their background with their present offending behaviour. Moreover, the report should also discuss their resolution efforts (tried or anticipated), proposed support plan involving family, friends, and the community, and non-custodial sentencing options.

759 Oliver Fredrickson "Systemic deprivation discounts and section 27 Reports: progress but not perfect" (2020) 9 Māori LR 4.
760 *R v Patangata* [2019] NZHC 744 at [45].
761 At [37] as cited in Frederickson, above n 763.
762 *Patangata*, above n 764, at [46].
763 At [48].
764 At [46] as discussed in Frederickson, above n 763.
765 *Heta*, above n 761, at [66].
766 *Su'e v R* [2019] NZHC 2501 at [35].
767 At [36].

In a 2021 article, Mongrel Mob lifetime member and Hard2Reach co-director Harry Tam expressed his ardent support of s 27 reports, commenting that "many offenders are illiterate and inarticulate and have often been alienated from society."[768] Therefore, they need writers with the skills and expertise to unpack their lived experience and put their offending behaviour in context for a sentencing judge.

Tam emphasises the distinction between s 27 reports and pre-sentence reports, the latter of which is provided by a probation officer:[769]

> The pre-sentence reports are to provide the courts with formal advice from a statutory agency. Their predominant focus is to advise the court on what it considers to be the appropriate sentence, factoring in the level of risk that person poses to community safety, their ability to comply with a sentence, issues of restitution and victim's needs. However, s 27 reports predominantly focus on the disadvantages that may have contributed to the person's offending behaviour and options to address it.

However, Tam's views are not shared by all members of the profession do not share Tam's views. Before 2018, District and High Court judges were found to be ordering s 27 reports, particularly for Māori and Pacific offenders, unaware that the Ministry of Justice did not automatically fund them. Venning J observed:[770]

> Judges may have resorted to directing cultural reports under section 27 as some felt they were not receiving sufficient assistance about cultural information and related information from the standard pre-sentence reports under s 26.

In June 2018, the Chief District Court Judge Jan-Marie Doogue stated that the Ministry would no longer fund s 27 reports (except for in the Youth and Family Courts). Reports could only be funded through a legal aid extension or by the defendant. The funding cut was an immediate cause for concern for Pacific lawyers and justice advocates, with then-PLA president Tania Sharkey commenting:[771]

> Halting that funding has far-reaching consequences for our [Pacific] community. I think as a legal profession we were just concerned because we know the benefits that those reports can have and the fact that the large overwhelming majority of our community cannot afford those reports privately and are not entitled to legal aid.

768 Rod Vaughan "Costs balloon for offender's cultural reports" (16 April 2021) Auckland District Law Society <www.adls.org.nz>.
769 Vaughan, above n 772.
770 Smith, above n 750.
771 Smith, above n 750.
772 Vaughan, above n 772.
773 Vaughan, above n 772.
774 Vaughan, above n 772.
775 Vaughan, above n 772.
776 Vaughan, above n 772.
777 Khylee Quince "Authentic voices too often missing from conversation" (3 April 2021) Stuff <www.stuff.co.nz>.

Despite the funding cut, between 2019 and 2020, the number of s 27 reports ordered rose by 350 per cent, with their respective costs to Legal Aid Services and the Public Defence Service rising from $639,311 to $3.3 million.[772] This excludes s 27 reports paid for by an offender or their lawyer. Report costs are not fixed and can cost anywhere between $700 and $6,600.[773] There is currently no regulatory oversight measuring their cost and quality. Due to evidential rules, defence lawyers are not permitted to write s 27 reports and must contract report writers. Independent justice advocate Ruth Money argues that taxpayer money would be better spent on offender rehabilitation programmes as the pre-sentence reports are a sufficient mechanism to discuss the offender's background and sentencing options.[774] While Money supports the legislative intention of s 27, she is of the view that many report writers see their role as a money-making scheme, churning out "cut and paste excuses drawn from a handful of templates" without oversight.[775] This view is apparently held by certain members of the judiciary who are also not persuaded that a background of deprivation necessarily warrants a sentence discount.[776]

As Khylee Quince writes in her opinion piece for Stuff NZ:[777]

> That [s 27] process is obviously inherently personal and subjective – with those closest to the offender giving information about a person and circumstances they know well. By definition, independent report writers are meeting people they do not know, often meeting only once or twice, and attempting to collate intensely personal information from people with whom they do not have an ongoing relationship.
>
> That model fits within the Western legal culture of objective assessments about offenders, that we see from psychologists, psychiatrists and social workers. Some judges are suspicious about community speakers, preferring the arm's-length approach of independent writers, because that fits within that model.
>
> However, the clear spirit and intent of the original provision was to increase community engagement in the process, by empowering whānau to speak for themselves – in giving context to the wrongdoer's life, by speaking to their risk and protective factors, and sharing what the community can offer by way of support and options for rehabilitation and reintegration.

We contend that the overreliance on independently written s 27 reports risks turning the process into something of a sentencing industrial complex, flattening complex lives into digestible synopses whilst disincentivising "authentic voices" from being heard. There is an ineffable power in someone close to the offender speaking directly to the court in ways a report writer cannot capture.

Moreover, including those closest to the offender, whether they are family, friends, or community members, gives those groups collective agency and accountability in the proceedings.

Prison

> There is no correlation anywhere in the world between the imprisonment rate and the crime rate. The imprisonment rate is not a measure of crime; it is a measure of the consumption of punishment. New Zealand society does not just have a tolerance for a high incarceration rate — it has enthusiasm for it.
> —Dr Tracey McIntosh[778]

Aotearoa New Zealand is one of the most punitive nations in the world. In 2018, we imprisoned at a rate of 214 per 100,00 people. Between 1999 and 2009, we overtook the United States as having the highest incarceration rate for people "of colour", with the overwhelming majority of those being Māori.[779] As John W Buttle writes:[780]

> A yearly increase in the number of people incarcerated has seemingly become an expectation of those living in Aotearoa/ New Zealand. In 2013, the total prison population reached 8,223 inmates—a rise of 300% since 1985—and in 2016, the prison population was resting at 9,525 inmates, with future projections indicting that it could reach 10,000 sometime between August 2016 and May 2017. Even with new prisons having just been built, this dramatic increase in numbers has strained New Zealand's prison system. Many inmates are now two to a cell, while prison gyms and container units are being used to house prisoners. The cost of keeping each individual prisoner is approximately $97,000 annually.
>
> With eye-watering yearly spends of around $165,000,000 for remand facilities on top of the $590,000,000 spent on sentenced prisoners (as per 2012), the affordability of prisons is questionable, especially given that they divert funds from social services.

Since March 2018, the total prison population has reduced by more than 25 per cent, the most significant drop in two decades. Nevertheless, Māori comprise 53 per cent of the prison population despite being only 15 per cent of the general population. Of this, wāhine Māori comprise 57 per cent of the women's prison population. An extensive body of scholarship has critically discussed our appetite for "penal populism" and mass incarceration of Māori since the 1980s. However, few scholars have discussed the increasing overrepresentation of Pacific peoples in prison since the early 2000s. As of June 2020, there are 1,095 Pacific people currently incarcerated (both sentenced and in remand), making us 11.6 per cent of the total prison population. Our prison population steadily rose from 629 in 2000 to peak at 1,178 in 2018.[781] Of the 1,095 Pacific people currently incarcerated, 63 per cent have been convicted of a crime and sentenced.[782]

778 Tracey McIntosh "Prisoners, human rights, legislative measures and over-representation" (Inaugural Bishop Selwyn Forum, Auckland, 17 October 2015) at 1.
779 Adele N Norris "Are We Really Colour-blind? The Normalization of Mass Female Incarceration" (2019) 9 Race and Justice 454.
780 John W Buttle "Imagining an Aotearoa/New Zealand without Prisons" (2017) 3 Counterfutures 99 at 101 (footnotes omitted).
781 Department of Corrections, above n 91, at 3.

These figures prompted us to submit an OIA request to the Ministry of Justice asking for any research exploring Pacific peoples and prisons. In response, we received a tranche of documents about the Justice Pacific Reference Group formed by the Ministry of Justice in 2007.[783]

The Reference Group was made up of Pacific community leaders and justice experts to "assist in developing a Plan of Action to address ongoing issues of Pacific peoples offending and victimisation."[784] This was followed by the first National Pacific Community Safety and Crime Prevention Fono, a two-day gathering "to discuss policies and programs that provide tools for Pacific individuals and communities to navigate towards safer families; safer communities; empowered youth; respectful relationships and healthy lifestyles."[785] In his opening address, then-Minister of Justice Mark Burton cited the bloated prison population as "one of the most significant challenges facing the justice sector," observing the overrepresentation of Pacific peoples in prison and as violent offenders.[786]

Notably, the groundwork covered in the analysis behind the 2006 draft programme of action for Pacific Peoples featured valuable insights into the needs of Pacific peoples in the justice system. The consultation included a:[787]

> ... series of regional fono (meetings) with over 150 participants, interviews with over 100 prisoners in Corrections facilities, Pacific service providers and a national fono attended by over 250 Pacific people.

As per the report, the Justice Sector Pacific Officials Group identified four familiar drivers of criminal offending for Pacific peoples:[788]

A. Low income and educational achievement;
B. Inadequate housing;
C. Abuse of alcohol and drugs; and
D. Family dysfunction.

The Reference Group also identified the common issues with justice sector responses to offending, including:[789]

A. The value of early intervention;
B. The need to build provider workforce capacity and capability;
C. Concerns over funding levels and consistency; and
D. The degree of cooperation between government agencies responsible for interventions.

782 At 13.
783 Documents relating to the Justice Pacific Reference Group (2006-2009) (Obtained under Official Information Act 1982 Request to the Criminal Justice Policy Group, Ministry of Justice).
784 Luamanuvao Laban "Pacific Safer Communities & Crime Prevention Fono" (speech to the National Pacific Community Safety and Crime Prevention Fono, Wellington, 12 June 2007).
785 Laban, above n 788.
786 Laban, above n 788.

The Reference Group also gave insight into the roles the community, family and church could play in developing Pacific-centred solutions to harm and victimisation. They found that:[790]

> A contributing factor to offending by Pacific peoples appears to be a clash between these traditional structures, hierarchies and relationships and the reality of life in urban NZ or in some case the disintegration of these structures and relationships.

And:[791]

> Church ministers are still influential and respected leaders in most Pacific communities. However, many are new migrants and are not necessarily familiar with the practical reality of life for their parishioners in urban NZ. Some may ignore some of the pressing issues facing them such as youth offending, gambling and sexual offending.

The Reference Group also unpacked what influenced serious violence and sexual offending by Pacific peoples. Insightfully, they emphasised that serious violent offending was often "fuelled by perceived slights, a need for revenge, or excessive alcohol or drug intake."[792] Meetings were then held with offenders who helped identify what interventions should be focussed on. They said;[793]

A. Parenting and basic family values;
B. Education and employment;
C. Activities and services for youth;
D. The drinking culture;
E. Empowering communities to take responsibility for reporting and responding to offending;
F. Environmental design;
G. Increased used of diversion and restorative justice for Pacific people; and
H. Male violence.

Offenders also noted that the Department of Corrections did not provide enough services for Pacific offenders. They also said that in order for future interventions and services to succeed, there needed to be:[794]

787 Justice Sector Pacific Reference Group *Effective Interventions: Draft Programme of Action for Pacific Peoples* (Ministry of Justice, 7 November 2007) at 5.
788 At 7.
789 At 7.
790 At 8.
791 At 9.
792 At 9.
793 At 11–12.
794 At 12.
795 At 13.
796 Ministry of Justice "Effective Intervention and Pacific People: Offenders' Consultation" (Obtained under Official Information Act 1982 Request to Criminal Justice Policy Group, Ministry of Justice).

A. More Pacific role models and leadership from within Pacific communities;
B. More Pacific providers (including victim services and offender treatment services;
C. Greater strategic commitment and communication and coordination between government agencies;
D. A particular role for Pacific churches; and
E. Increased cultural awareness among mainstream providers.

The Reference Group also identified the factors inhibiting effective responses to Pacific offending. These included:[795]

A. Lack of community leadership, understanding and participation;
B. The ambiguous role played by Pacific churches; the churches are potentially a huge resource. However many churches do not take part in such programmes;
C. Lack of connectedness from Pacific people to their New Zealand communities and to programmes that could address their behaviour;
D. Programme content and delivery; and
E. Capability and capacity of the workforce and community.

Further information released to us in the OIA request included notes on "Effective Intervention and Pacific Peoples" from the Reference Group's consultations with Pacific offenders and youth offenders.[796] Notably, 80 per cent of the consultations with offenders were with Pacific women aged 16 to 64.[797] To our knowledge, this remains the most comprehensive research on Pacific women offenders. Based on the information released to us, the following causes of Pacific youth offending were identified:

A. Peer pressure and affiliation with gangs, including parents and siblings;
B. Unstable families and poor role modelling;
C. Alcohol and drugs from an early age;
D. Family violence, including sexual violence;
E. Cultural alienation and confusion of cultural identity;
F. Experiences of racism; and
G. Issues in the education system.

For adult offenders, they cited the following as the drivers of their offending:[798]

A. Debt and gambling;
B. Anger;
C. Family problems - domestic disharmony, sexual abuse, or dysfunction;
D. Alcohol; and
E. Sexual and domestic abuse.

797 At 41 and 47.
798 At 50.

Youth offenders also commented on their experiences in the justice system and in youth justice facilities. These experiences were noted under the youth offender and general offender presentations. The key themes that emerged were:[799]

A. A significant proportion had no experience or only one brush with the criminal justice system before the offence which landed them in jail;
B. Some suggested a lack of knowledge of what is deemed acceptable behaviour in New Zealand society;
C. Some claimed not to understand their legal rights when apprehended;
D. Problems with getting access to lawyers when arrested and with the quality of, and information given by, some lawyers; and
E. Not enough Pacific content in justice programmes.

The OIA also included a further report on interviews conducted by Michael Dreaver Associates with Pacific inmates and young offenders, which was used to assist with developing the Reference Group's Programme of Action.[800] Michael Dreaver Associates spoke to 133 inmates across 12 prisons and two youth justice facilities, with the participants being a "reasonable reflection of the demographics of the overall Pacific people offender population."[801] In this report, offenders identified their drivers of offending as including:[802]

A. Family dysfunction;
B. Cultural dislocation
C. Conflicting cultural perspectives;
D. Difficulty managing anger;
E. Alcohol and drugs;
F. Gambling and financial problems;
G. Communication difficulties;
H. Negative influences including gang culture.

Again, this was an incredibly comprehensive report containing detailed recommendations on how best to address offending by Pacific peoples and what targeted interventions are needed. Participants discussed the role of religion, the harshness of Māori or Pacific Island police officers toward them, their lack of access to programmes within prisons, and their appreciation for the Saili Matagi programme and faith-based units in prison.

In our view, the Reference Group's work is the most extensive research done on Pacific peoples and the justice system to date, and we must consider how their findings might align with the responses from our Knowledge Holders. Moreover, it is disappointing that this research is not publicly accessible or widely used in current criminal justice policy and practice, given the valuable insights it contains. Our preliminary analysis of recent justice sector reforms suggests that many of the Reference Group's recommendations have not been adopted despite the volume of work that was undertaken.

799 At 43–44.
800 Michael Dreaver *Pacific Programme of Action: Report on Interviews with Inmates and Young Offenders* (Ministry of Justice, June 2007) (Obtained under Official Information Act 1982 Request to Criminal Justice Policy Group, Ministry of Justice).
801 At 222.

OMBUDSMAN'S REPORTS

The Ombudsman deals with complaints about and investigates the conduct of public sector agencies to guide organisational improvement. This can include unannounced inspections and investigations into prisons and other places of detention. In reviewing Ombudsman investigations since 2010, we identified two reports relevant to this research. The 2017 *Report on an unannounced inspection of Spring Hill Corrections Facility under the Crimes of Torture Act 1989* by Peter Boshier made comments on the Pacific Focus Unit, Vaka Fa'aola, the only Pacific focus unit in any New Zealand prison.[803] During the inspection, the Ombudsman noted that "Vaka Fa'aola Unit was no longer running a structured programme" and "there was no current programme provider for the Unit."[804] Critically, the report found that "the intended cultural focus for the Unit appeared lost" and that the prison as a whole "could be described as lacking cultural flow and cohesion."[805]

The 2020 *Final report of an unannounced inspection of Auckland Prison under the Crimes of Torture Act 1989* by Peter Boshier identified some critical issues with the treatment of prisoners.[806] Of the 269 questionnaires returned by inmates, 261 stated their ethnicity, with 43 noting they fit into the "Asian & Pacific Islander" category.[807] It is unclear whether inmates were able to select more than one ethnicity, and the existence of the categories "Māori/Pākehā", "Kiwi/New Zealander", and "NZ European/Pākehā" adds further ambiguity as to the exact ethnic breakdown of participants in the questionnaire.

Boshier stated his overall disappointment that the Department's intention to shift from a model centred on "containment and management" to one of "rehabilitation and reintegration" was yet to be realised.[808] Boshier also highlighted several matters that he found deeply concerning, including:[809]

A. "[T]hat there were prolonged lengths of stay occurring in the Assessment Unit, with some prisoners in maximum security held on a regime of undocumented segregation."
B. "Staff shortages were having a significant impact on many aspects of the custodial operation."
C. "The majority of prisoners in Units 12 and 13 (maximum security) spent between 22 and 23 hours a day locked in their cells and were subject to a basic yard-to-cell regime."

Boshier identified that remand prisoners are managed as high-security prisoners by default, which limits their opportunities to participate in prison activities.[810] Boshier's

802 At 226.
803 Peter Boshier *OPCAT Report: Report on an unannounced inspection of Spring Hill Corrections Facility Under the Crimes of Torture Act 1989* (Office of the Ombudsman, August 2017) at 19.
804 At 19.
805 At 19.
806 Boshier, above n 654.
807 At 89.
808 At 1.

report also found that in response to an earlier recommendation that "[r]emand prisoners are provided with more opportunities to engage in constructive activities on a daily basis", a number of programmes, including a "Pasifika Identity Programme" had been implemented.[811] The report noted that these programmes have been accessible to remand prisoners since January 2020.[812]

No further information was provided about the "Pasifika Identity Programme." However, Corrections has developed a Māori Pathways programme as a part of their *Hōkai Rangi* strategy.[813] This programme encompasses several cultural advisory roles specific to Māori.[814] Corrections also noted that they have "Kaiwhakamana and Fautua Pasefika" who visit prison sites to "promote the wellness and wellbeing of people in our care."[815] The "Prisons Operations Manual" notes that Fautua Pasefika is :[816]

- "Pacific Community leaders who have access to prisons to enable the well-being of prisoners and networking back to their communities."
- "Fautua Pasefika is intended to be applied to those peoples of Pacific descent whom their communities have promoted as cultural advocates."

The manual notes that Fautua Pasefika exists to:[817]

- ... advise departmental staff on examples of best practices for working with Pacific prisoners.
- assist prisoners in establishing contacts with Pacific community groups;
- provide prisoners with news and information about local and national Pacific communities;
- assist prisoners with personal and extended family matters; and
- assist prisoners with reintegrative arrangements through their extended family and community.
- Fautua Pasefika are not employees of the Department.
- Fautua Pasefika are distinct from Pacific providers contracted by the Department to deliver services to prisoners of Pacific descent.

There is no available data for the frequency of visits from Fautua Pasefika, and we could not locate any further information about them.

PACIFIC WOMEN AND PRISON

In 2015, our women were six per cent of the total female prisoner population, up by two per cent since 2014.[818] Corrections data does not provide the exact percentage of our women currently incarcerated. We could not find any qualitative research exclusively dedicated to the experiences of Pacific women in prisons. However, several studies on national women's prisons included contributions from our women.[819]

809 At 2 (footnotes omitted).
810 At 50.
811 At 51–52.
812 At 51–52
813 Department of Corrections *Hōkai Rangi: Ara Poutama Aotearoa 2019–2024 Strategy* (2019).

In 2021, the New Zealand Human Rights Commission (NZHRC) released a report on segregation, restraint, and pepper spray use in women's prisons in Aotearoa New Zealand. The report focused on three key areas: segregation, use of force and self-harm. University of Oxford academic Dr Sharon Shalev was commissioned by the NZHRC to produce a report based on:[820]

> ... statistical data and file notes provided ... by the New Zealand Department of Corrections, and on observations and interviews during a visit to Auckland Regional Women's Correctional Facility in July 2020.

The report made a key finding that Māori and Pacific women were disproportionately segregated into Management and Separated Units used for control and punishment.[821] At Auckland Region Women's Corrections Facility, 78 per cent and 75 per cent of segregations in the Separates and Management Units, respectively, were Māori women.[822] As many as 93 per cent of segregations lasting 15 days or longer in the Management Unit were of Māori or Pacific women. Consequently, one of Shalev's findings was that "[t]he over-representation of Māori and Pacific women in harsher forms of segregation requires urgent attention as does the development of culturally responsive programmes and unconscious bias training."[823]

Shalev concluded that the cohort of incarcerated women in Aotearoa New Zealand, many of whom are of Pacific descent, are particularly vulnerable to the harms of imprisonment due to their "high levels of deprivation, trauma and multiple and complex needs."[824]

Additionally, Shalev notes that Corrections needs to take a closer look at the way Māori and Pacific women are managed in prison and ensure that their aspirations expressed in policy statements are backed by practical changes on the ground.[825] While the report does not delve too deeply into the relevant needs of Pacific women in prison, it highlights some critical issues in the racialised treatment of Māori and Pacific women in prisons.

814 Department of Corrections "About Māori Pathways" <www.corrections.govt.nz>.
815 Boshier, above n 654, at 79.
816 Department of Corrections "Prisons Operations Manual: V.02.Res.06 Fautua Pasefika visits" <www.corrections.govt.nz>.
817 Department of Corrections, above n 820.
818 Department of Corrections, above n 96, at 2.
819 See Anna Leask *Behind Bars: Real-life Stories from Inside New Zealand's Prisons* (Penguin Random House, Auckland, 2017); Fraya Lancaster "Violence in New Zealand Women's Prisons" (MA Thesis, University of Waikato, 2020); and Jacqui Johnson "Monitored Mothering: The Experience of Mothers who Parent Within New Zealand Women's Prisons" (PhD Thesis, University of Canterbury, 2019).
820 Sharon Shalev *First, Do No Harm: Segregation, restraint, and pepper spray use in women's prisons in New Zealand* (New Zealand Human Rights Commission, November 2021) at 11.
821 At 10.
822 At 25.
823 At 11.
824 At 21.
825 At 61.

Prison Abolition

The preceding discussion has primarily revolved around reformist propositions to improve the position of our people within carceral institutions. While successive governments have implemented various initiatives to address our overrepresentation within the justice system, the literature is almost unanimous in finding that prisons are wholly ineffective in reducing harm, rehabilitating offenders, supporting victims, and deterring criminal offending. Even conservative politicians have conceded that prisons are "a moral and fiscal failure."[826] In contrast to reformist appeals to improve the penal system, prison abolitionists seek to eliminate prisons and all carceral institutions in favour of building rehabilitative and restorative systems that address social harms at their roots.

Abolitionists acknowledge that the "[t]he absence of prisons would not in itself create the conditions for individual or societal freedom", and we must dismantle racism, capitalism, and colonialism to build life-affirming institutions for all.[827]

"For as long as there have been prisons, there have been calls for abolition."[828] Arguably, the genesis of prison abolition in Aotearoa New Zealand began with Māori resistance to the imposition of the colonial justice system.[829]

As Lamusse and McIntosh explain:[830]

> While [Māori] accepted that their whānau should take responsibility for their actions, many refused to hand over their whānau for imprisonment, as it was seen as "degrading", "pointless", and an "inappropriate method of punishment"

This historical context is important because the 187 years of Māori resistance informs the contemporary struggle for abolition against the settler-colonial justice system. By the 1970s, the New Zealand Movement for Alternatives to Prison argued that prisons were "an expiring system" and that penal institutions:[831]

> ... are based on the public's desire for revenge and retribution rather than providing workable habitation opportunities to assist offenders with their reintegration into the community.

However, the introduction of neoliberal economic policies in the 1980s reaffirmed Aotearoa New Zealand's desire for penal populism, significantly increasing our incarcerated population. At present, PAPA is the only explicitly prison abolitionist organisation in Aotearoa New Zealand.[832]

826 Otago Daily Times "Prisons: 'moral and fiscal failure'?" *Otago Daily Times* (online ed, 24 May 2011).
827 Ti Lamusse and Tracey McIntosh "Prison Abolitionism: Philosophies, Politics, and Practices" in Elizabeth Stanley, Trevor Bradley and Sarah Monod de Froideville (eds) *The Aotearoa Handbook of Criminology* (Auckland University Press, Auckland, 2021) 242 at 242.
828 Fay Honey Knopp *Instead of prisons: A handbook for abolitionists* (Prison Research Education Action Project, New York, 1976) at 13–15
829 Lamusse and McIntosh, above n 831, at 246.
830 Lamusse and McIntosh, above n 831, at 246.
831 Roger Mc Neill, Pat Magill and Kerry Kitione (eds) "What is the Kaupapa of MAP?" (2008) 103 Movement for Alternatives to Prison 1 at 12.

In 2016, PAPA (formerly No Pride in Prisons or NPIP), published 50 abolitionist demands for the government to implement, ranging from short-term strategies of decarceration to bold immediate and long-term actions including the progressive defunding of the Department of Corrections and the total decolonisation of Aotearoa New Zealand.[833]

While the demands of abolitionists are neither exhaustive nor neatly defined, they all espouse a clear rejection of criminal justice reform in favour of dismantling carceral systems (including the police) by addressing social harms at their root and transferring the responsibility of public safety to local communities. This necessarily requires redistributing public spending from carceral institutions into housing, education, employment, and healthcare. As McIntosh contends:[834]

> We have to get away from the idea that locking people up is acceptable. A new prison is estimated to cost $1.5 billion. If we spent that money on health or education, what outcome would we get? We would expect it to make a positive difference.

Our stocktake of the abolitionist literature identifies a small but robust body of scholarship by Indigenous and Pākehā scholars, writers, and activists in Aotearoa New Zealand, to draw upon. However, until 2022, there was a notable absence of abolitionist writing by Pacific peoples despite many members of our community aligning themselves with anti-prison movements throughout history.

In mid-2022, Samoan legal academic and self-described "Pacific abolitionist legal scholar" Dylan Asafo published "Freedom Dreaming of Abolition in Aotearoa New Zealand: A Pacific Perspective on Tiriti-based Abolition Constitutionalism" arguing for the abolition of prisons and carceral institutions through constitutional transformation grounded in Te Tiriti.

Asafo draws on the global resurgence of the Black Lives Matter movement in 2020 as a catalyst for our "unprecedented reckoning" with the racism within Aotearoa New Zealand's police and prison systems and bringing abolitionist ideas into mainstream discussions about crime and justice.[835] Asafo dynamically engages with the productive tensions inherent in achieving abolition in Aotearoa New Zealand, acknowledging that while we are wise to draw upon the wisdom of Black American abolitionists:[836]

> Pacific peoples as Tangata Moana and other Tauiwi as Tangata Tiriti [must] follow the lead of Māori in transforming our constitutional arrangements so that te Tiriti can finally be honoured.

Asafo contends that, at the very least, we must seriously engage with prison abolition to see genuinely transformative outcomes for our communities beyond the settler-colonial

832 Ti Lamusse "Lessons from the prison abolitionist movement in Aotearoa/New Zealand" in Michael J Coyle and David Scott (eds) *The Routledge International Handbook of Penal Abolition* (Routledge, London, 2021) 50 at 50.
833 No Pride In Prisons "Abolitionist Demands: Towards The End of Prisons in Aotearoa" (September 2016) <www.papa.org.nz>.
834 Julianne Evans "Breaking Down the Walls" *UniNews* (online ed, Auckland, May 2018) at 5.
835 Asafo, above n 83, at 82.
836 At 110.

justice system. Through identifying how successive governments have failed to address racist violence, Asafo builds a compelling call to action for how "'justice could be [fully and] better realised without the police and prisons under a Tiriti-based Aotearoa New Zealand" for all citizens.[837]

This aligns with the words of Moana Jackson who said, some forty years earlier, that:[838]

> For the Treaty to continue to be affirmed as being of crucial importance to New Zealand's foundation, the recognition and protection of those rights can only be achieved through an acceptance that the Treaty has a legal status akin to that accorded it prior to the Wi Parata decision [which described the Treaty as a "simple nullity"]
>
> ...
>
> The constitutional basis for a parallel Māori system of criminal justice therefore rests on both the indigenous right of Māori people to assert their tangata whenua status, and on the guarantees of the Treaty to preserve rangatiratanga and Māori customs. But perhaps more important in some ways than any cultural, philosophical or constitutional need for such a system is the simple but often expressed view elicited in this research that "The statistics, and what we see, what we know, shows us that the Pakeha system isn't working for us ... maybe a Māori way will."

Although Jackson did not explicitly use the term "abolition" in *He Whaipaanga Hou*, he is nevertheless considered one of Aotearoa New Zealand's preeminent abolitionist thinkers who continually advocated for an end to carceral institutions in order to "bring this country much closer to finding alternative ways in Māori traditions."[839] In our view, the current incarceration crisis demands that abolition is centred in any discussion about the justice system's future.

Parole

Research on parole decisions in Aotearoa New Zealand is limited. The Parole Board does not publish information regarding their decisions. Furthermore, research on ethnicity and ethnic disparities between both the parolees and the parole board is few and far between. One study in 1992 examined decisions of the District Parole Boards from 1985 to 1989, using a multivariate analysis of 600 offenders. Of those, 58 per cent identified as Māori and/or Pacific.[840] Unfortunately, this data was not disaggregated between Māori and Pacific, lumping the two in the same "Polynesian" category. It is, therefore, difficult to determine precisely how many of us comprised the sample population. Nevertheless, in 2009, Morrison found that:[841]

837 At 102.
838 Jackson (1988), above n 1, at 275–276 (emphasis omitted).

> [T]he "race" variable was standing in for another underlying factor, namely that the Māori community were more sensitive to the needs of Māori prisoners, and that, as a result of this, a far broader range of programmes and options were available to Māori prisoners through their access to iwi, hapū and whānau networks. ... [T]his enhanced [their] access to programmes and community support, rather than "ethnicity" per se which led to positive parole outcomes.

Responses from the *He Waka Roimata* Report indicate that many of the problems related to our incarcerated population were intimately related to parole.[842] Based on the responses from more than a thousand participants, it was said that "parole does not work well" and that the parole board's decisions are "frequently inconsistent and unfair and lack transparency."[843]

Respondents cited the lack of integration between prison rehabilitation programmes and parole recommendations, insufficient guidelines, high-risk aversion, inflexible reporting conditions, and offenders feeling like they were being set up for control rather than support.[844] Moreover, eighty-three per cent of victims said the criminal justice system is not safe for them.[845] Victims noted that the justice system is not responsive and that decisions about what happens when a crime is committed exclude the victim, including when the Parole Board decides whether or not to release an offender.[846] Victims also highlighted that the process of making a written or oral submission to the Parole Board does not empower them and can often be re-traumatising.[847]

In 2020, academic and founding member of PAPA, Ti Lamusse, penned an op-ed on racism and the Parole Board.[848]

The piece is a searing indictment of the board's function, describing it as "another injection of adrenaline into the racist criminal justice system."[849] Lamusse argues that the justice system is institutionally racist, and statistics released under the Official Information Act "clearly demonstrate how the Parole Board acts as a crucial cog in the machine of institutional racism and mass incarceration of Māori and Pacific communities."[850]

Lamusse cites that between 2002 (when the Parole Board was first established) and 2004, only a handful of offenders (approximately five) served the maximum sentence of their term. However, by 2005 this rose to 91, and by 2018, this ballooned to 597.[851] Māori were over half of those more likely to serve their complete sentence, corresponding to 51 per cent of the prison population that year (2018). Lamusse concluded that the Parole Board essentially:[852]

839 Moana Jackson "One law for all or one justice for all?" Newsroom (13 November 2018) <www.newsroom.co.nz>.
840 See Mark Brown *Decision-making in District Prison Boards* (Department of Justice, Wellington, 1992).
841 Morrison, above n 226, at 55 (emphasis omitted).
842 Te Uepū Hāpai i te Ora (Safe and Effective Justice Advisory Group) *He Waka Roimata: Transforming Our Criminal Justice system* (Ministry of Justice, June 2019) at 51.
843 At 51.
844 At 52.
845 At 16.
846 At 16.
847 At 20.
848 Ti Lamusse "The Parole Board has a racism problem and it's hurting all of us" (30 October 2019) The Spinoff <www.thespinoff.co.nz>.
849 Lamusse, above n 852.
850 Lamusse, above n 852.

> ... adds another level of institutional discrimination. At the big picture level, the Board is taking a prison population that is disproportionately Māori and locking up Māori for even longer once they are in prison.

Adopting a further intersectional analysis, in 2018, Māori women comprised 84 per cent of all women serving their complete sentences. Lamusse adds, though, that while the statistics are comparatively "better" for Pākehā, the percentage of those released on first appearance had dropped from 26 per cent to 16.8 per cent between 2010 and 2018, concluding that "poor and working-class pakeha are also swept into the increasingly punitive system, while we all pay the costs."[853]

The chairperson of the New Zealand Parole Board, Sir Ron Young, provided a brief response to Lamusse's opinion piece, stating: "The New Zealand Parole Board makes public safety decisions based on risk, not race."[854] He acknowledges that many Māori appear before the board and often present risk factors including, but not limited to:[855]

- Gang affiliations
- Violent offending convictions
- A higher number of prison terms
- Shorter time between the most recent and any prior prison terms
- Higher statistical risk scores ... [and]
- Maximum or high-security classification in prison
-

As to the demographic of the parole board, he claims:[856]

> Our Board membership comprises 45 experienced, considerate, diverse professionals who together share one of the toughest jobs in the country. They are selected by the Attorney-General for their unique skills and expertise. These 45 experts respect the mana of all offenders regardless of race, background, or any other demographic. I want to publicly acknowledge the tireless, unsung role they fulfil on behalf of all New Zealanders.

At the time of writing, there are currently two Pacific parole board members. For Report 2, we hope to consult with offenders who have been through the parole process and Pacific members of the parole board (current or former).

Offender Rehabilitation

On 1 August 1997, the Department of Corrections published the *Report on Research into Characteristics of Rehabilitation Programmes which are Most Successful in Engaging Pacific Islands Offenders* prepared by Keneti Apa.[857] The report found that, as of 1991, Pacific offenders were nine per cent of the prison population — almost double our population size at the time (five per cent).[858] To date, Apa's report remains one of the few research projects about the experiences of incarcerated Pacific people and the efficacy of Corrections interventions to reduce Pacific offending.

The purpose was to assess the effectiveness of prison interventions for incarcerated Pacific people and to identify what characteristics make specific programmes successful. Fourty-five respondents were interviewed through individual and focus groups over a three-week period. A written questionnaire was used, although not strictly employed. Although not explicitly stated, the methodology was akin to a talanoa — a semi-structured conversation that inherently allows for a flowing dialogue. No programme providers were interviewed due to the limited scope and timeframe of the research. The report interviewed Pacific people from seven different prisons between Auckland and Wellington. The majority were Pacific Islands-born (84 per cent), male (84 per cent) and Samoan (60 per cent). Each programme's "success" was determined by its completion rate, satisfaction rate and relevance to the respondents personally.[859]

Apa found that the most popular programmes were cultural programmes provided and facilitated by Pacific service providers and/or cultural groups.[860] Cultural programmes were defined as those run by ethnic-specific Pacific island groups about aspects pertaining to their culture; for example, song, dance, tradition, language, church, etc. These groups also provided counselling and information on anti-social behaviours including anger management, drug and alcohol abuse and relationships. Apa identified that all the programmes were delivered in the respective Pacific islands' languages, which was critical given many respondents were Pacific Island-born and bi-lingual.

Apa identified the following features are being critical to a programme's success;

A. Sharing amongst individuals;
B. Group interaction;
C. Communication; and
D. Creating a trusting environment.

The report stated that "a trusting environment was achieved by primarily having a tutor or facilitator of their [the respondents'] own culture", as well as being delivered in their own language.[861] The respondents from the Mangere Community Corrections Centre (now defunct) also emphasised that sustained involvement was an important feature, enabling offenders "to begin the reconciliation processes in a safe and neutral environment."[862]

851 Lamusse, above n 852.
852 Lamusse, above n 852.
853 Lamusse, above n 852.
854 Lamusse, above n 852.
855 Lamusse, above n 852.
856 Lamusse, above n 852.
857 Keneti Apa *Report on Research into Characteristics of Rehabilitation Programme which are Most Successful in Engaging Pacific Islands Offenders* (Department of Corrections, August 1997).
858 At 6.
859 At 9.
860 At 10.
861 At 10.
862 At 10.
863 At 10.
864 At 11.
865 At 11.

Although it was outside the scope of the report to comment on the reasons for each respondent's criminal offending, it did glean that when issues (such as anti-social behaviours and violence) were "put into a cultural context, participants were able to understand the nature of their offences."[863] This is an important insight for service delivery, as offending is not committed in a vacuum. The report also commented on the least popular programmes as identified by the respondents.[864] These were the Samoan Culture Group, the Memory Skills programme, and Substance Abuse and Anger Management.

The reasons given were lack of relevance, confusion about the content, poor tutor expertise, language difficulties and lack of enjoyment.[865] Apa notes that respondents were initially reluctant to comment negatively on the programmes and only provided insights after reassurance that they would not face repercussions/censure.

This is a small but important insight when interviewing incarcerated individuals. Furthermore, one Rarotongan respondent said he felt excluded because "tutors treated me like a Maori."[866] Apa identified a correlation between ethnic-specific content and successful programme delivery. Furthermore, there was a near-unanimous agreement that future service delivery should have a greater variety of programmes in ethnic-specific languages and cultural context(s). Mainstream programmes were considered insufficient to meet the needs of incarcerated Pacific people. Apa concluded that:[867]

> The use of Palagi-based models create confusion and lack cultural equity in terms of empowering Pacific Islands offenders to reflect over their past actions and formulate their own strategies for change. The absence of core Pacific Islands values that underpin their very existence result in a lack of real understanding and participation, and in most instances, failure.

Participants also expressed concern that Corrections staff, social workers and rehabilitation personnel lacked rigorous data on Pacific offenders to base their interventions. This finding is unsurprising given the lack of research at the time the report was written.

Moreover, Apa critiqued the absence of "clearly defined" Pacific core values in programme proposals, citing the lack of "cultural experts" and consultation with the wider community, much of this being consequent on the small number of Pacific peoples in justice sector roles.[868] The following recommendations were provided:[869]

A. Appointment of a National Pacific Islands Programmes Liaison Manager by the Department of Corrections to develop a marketing plan for programmes targeted at Pacific offenders and advise the department accordingly;
B. That for any provider contracted to run programmes for Pacific peoples a quality management system is established to ensure that the provider and Corrections meet their stated objectives;
C. All programmes aimed at Pacific offenders are assessed against national standards.
D. A national marketing plan;
E. Greater inclusion of families into programmes; and
F. Greater investment into research projects relating to Pacific Island offenders.

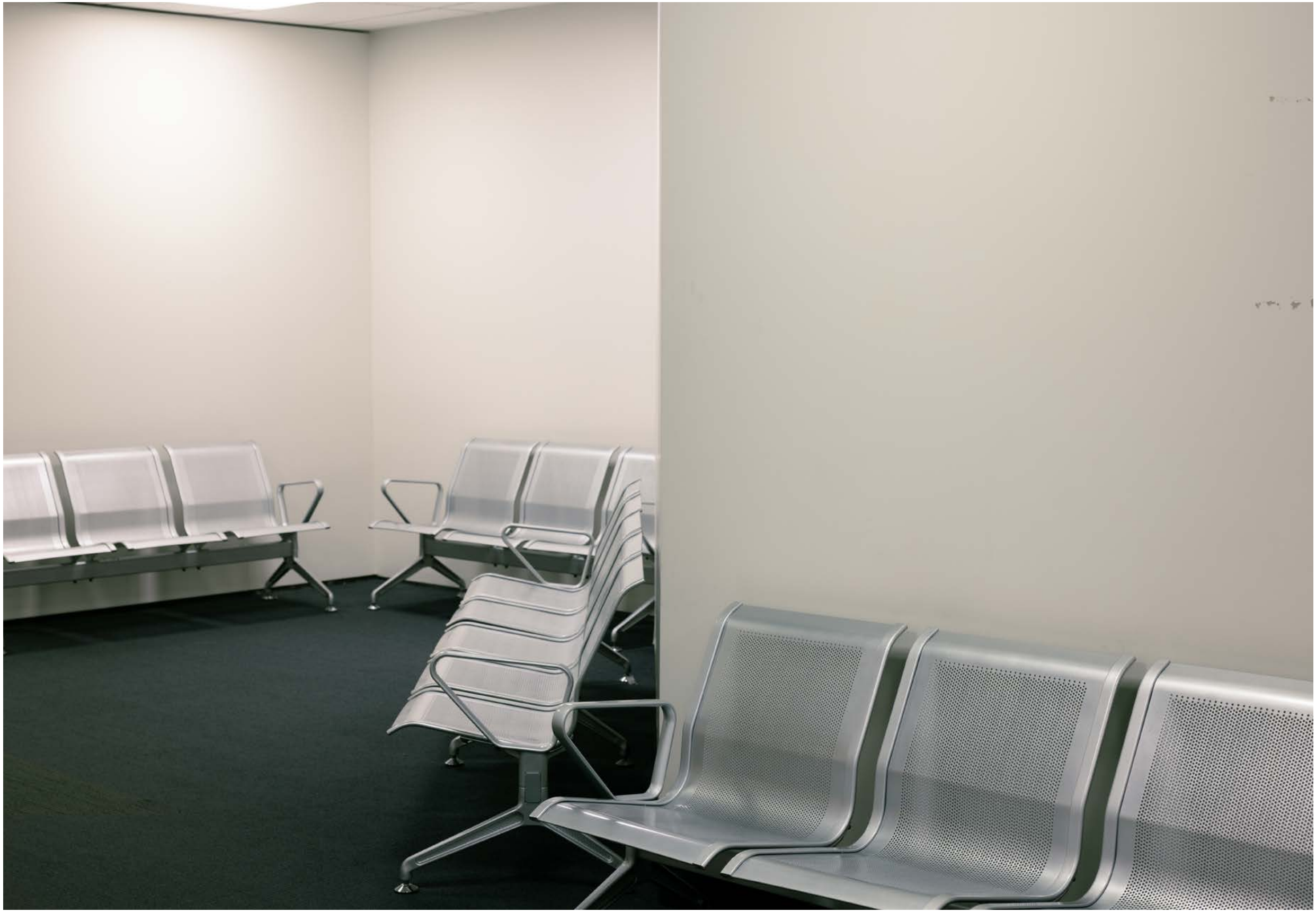
Given the relatively small sample size, only general conclusions could be drawn. It was accepted that intervention programmes are, by and large, a critical aspect of an offender's rehabilitative journey, irrespective of their ethnicity. However, in the case of Pacific offenders, specific characteristics needed to be included (and, inversely, excluded) in programme delivery.

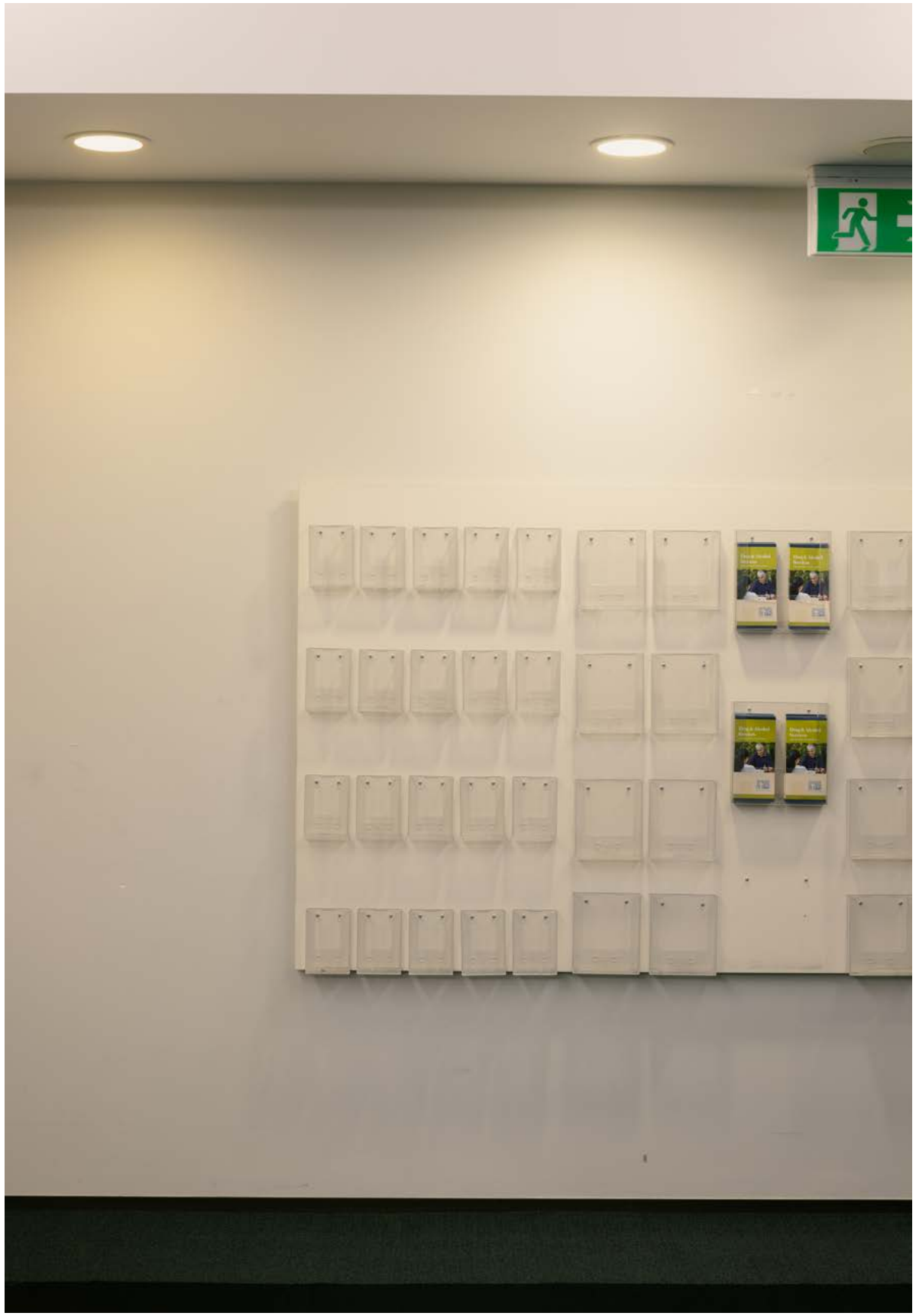
Apa recommended that, first and foremost, the Pacific offenders' "market" be appropriately disaggregated and specified. Second, and despite the success of culturally focussed programmes, an offender's needs should always be prioritised:[870]

> It is dangerous to jump into the culturally appropriate bandwagon for the sake of being politically correct, only to find out that we have missed the most important thing — the needs of the individual.[871]

Staffing was overwhelmingly the most important differentiator, followed by trust and relationality. The report was written to be read by policymakers, with clearly defined terms of reference and recommendations. While it could have benefitted from broader consultation and input from Corrections staff, the solutions moved from the general to the specific and provided clear benchmarks and metrics for implementation. Unfortunately, many directives offered to law and policymakers have not been implemented.

866 At 11.
867 At 31.
868 At 31.
869 At 2–3.
870 At 4.
871 At 4.





National Strategic Plans

In 2019, the Minister for Pacific Peoples Aupito William Sio (then Associate Justice Minister), hosted a public Pacific Fono on criminal justice reform.[872] Around 150 Pacific people attended the event that Chester Borrows and Professor Tracey McIntosh hosted from Te Uepū Hāpai i te Ora – the Safe and Effective Justice Advisory Group. Attendees were divided into community leaders, disability and youth interests, justice professionals, elders, Pacific women and members of the LGBTQIA+ community to discuss their experiences and ideas for justice reform.[873] Each group was given questions to respond to.[874] The main themes that emerged from each group included:[875]

- The court system, youth justice, Family Court, therapeutic courts, justice sector culture, and judges;
- Whānau, care, and protection;
- Prisons, rehabilitation and reintegration, punishment, and restorative justice; and
- Racism, institutional bias, and colonisation.
-

Their responses were grouped under the following headings:[876]

- The System is Racist;
- A System for the People;
- Low Pay and Poverty;
- Focus on our youth;
- Community grassroots; and
- Engagement and ownership of issues.

The responses overwhelmingly called for a review of the system as it is culturally unresponsive and not representative of Pacific peoples. Clear indications that the participants perceived the system as racist led some participants to suggest a need for a 'Brown' justice system that includes more Pacific representatives in the courtroom and a more culturally responsive justice system.[877]

"The System is Racist"

Respondents stated that the justice system is "inherently racist towards all minorities, Māori and Pacific people in particular"; that the system deals with people in a "one size fits all" approach, negating all sense of that person's identity and personal background that can inform the causes of their offending; that "Pacific do not share the same level of access as Pakeha"; and that "Pacific are racially profiled and automatically presumed guilty by the authorities."[878]

872 Notes from Ministry for Pacific Peoples Public Session (29 March 2019) (Obtained under Official Information Act 1982 Request to Ministry of Justice).
873 The handwritten notes from the session on disabilities and youth interests were indecipherable.
874 Notes from Ministry for Pacific Peoples Public Session (29 March 2019) (Obtained under Official Information Act 1982 Request to Ministry of Justice).

"A System For the People"

Some respondents proposed creating a "Brown" justice system to cater for the community's diversity of cultures. "It is a system that enables the communities to be able to administer justice for itself."[879] Furthermore, others asked for an "all-encompassing review of the justice system" and "a system led by the communities, where justice agencies are in collaboration with the community they serve."[880] One respondent suggested that each courtroom should have a Pacific representative to provide it with in-depth cultural expertise. Some believed the restorative justice process was "the way forward" for Pacific communities, given its similarities to how matters are dealt with under Indigenous models of justice and reconciliation[881]. One respondent was concerned that the offender's family was often treated "like co-offenders" and routinely "disrespected" throughout the process[882].

"Community First"

Ideas included reinvesting money from big companies that operate in cities like Manukau into community services and initiatives.[883] Responses also highlighted the key role of law and community advocates in the justice system and the importance of educating the community about the justice system. Participants in the fono also recognised that the underlying root causes of crime need to be addressed.[884]

"Professional Perspectives"

The responses from the session for professionals and practitioners predominantly focused on youth offending, s 27 sentencing reports, cultural competency of justice agents, and justice alternatives. In terms of the s 27 reports, responses identified funding eligibility as a barrier to Pacific people utilising s 27 reports.[885]

Participants said that s 27 reports would be more appropriate in the form of a verbal report to the court rather than the commonly used written reports. Participants also stressed the importance of culturally competent courts and supported introducing more youth and Pacific courts. The responses also advocated for a more Pacific-centric approach to justice. This approach would be more holistic and easier to understand for Pacific peoples and their families.[886] Notably, the responses also identified that youth and mental health providers do not have the specialist skills that are required to support youth in the system.[887] Tracey McIntosh facilitated the fono for women, elders and LGBTQIA+. Participants noted that the punitive system only perpetuates the impact of trauma, land loss, and loss of language and culture.[888]

The responses from this session underscored a need to look outside the system for unconventional approaches to justice, illustrating the inability of the punitive system to address Pacific women, elders, and members of the LGBTQIA+ community.[889] The breakaway groups allowed for intersectionality to be explored and for different experiences to emerge.

The fono provides a valuable touchstone for future inquiry. However, participant perspectives were limited to short sentences and notes with an absence of in-depth narratives. Furthermore, the OIA response noted that a separate, published report on the discussions at the Pacific Fono was not produced. The responses were instead incorporated into a wider database of responses that were considered by Te Uepū Hāpai i te Ora.

Mai Te Pō Ki Te Ao Mārama

In December 2020, Chief District Court Judge Heemi Taumaunu announced the launch of Te Ao Mārama ("transition from night to the enlightened world"), a new model for the District Court in response to decades-long calls for transformative change in the justice system. Judge Taumaunu explained the meaning behind the name:[890]

> I suggest that the calls for transformative change as they relate to the District Court could be translated as a concerted call to move towards a more enlightened world, to move towards te ao mārama, not just for Māori, but for all people of all ethnicities and from all cultures who are affected by the business of our court. This is because, modern day Aotearoa New Zealand is a multi-cultural and vibrant society with two founding cultures bound together by the principle of partnership based on the Treaty of Waitangi. In modern thinking, the vision of hope that is expressed in the Treaty relationship now extends to include all Māori and non-Māori New Zealanders regardless of culture or ethnicity. Hence the all-inclusive nature of the vision for the District Court as a place where all people can come to seek justice, no matter what their means or ability and regardless of their ethnicity or culture, who they are or where they are from.

His Honour emphasised that the model "will, of course, still mean that offenders will be held accountable and responsible … and that principled and lawful sentences, including

875 Hapaitia te Oranga Tangata "*Pasefika Fono*" (March 2019) (Obtained under Official Information Act 1982 Request to the Ministry of Justice).
876 At 7.
877 At 7.
878 At 3.
879 At 3.
880 At 3.
881 At 3.
882 At 3.
883 At 8.
884 At 9.
885 At 12.
886 At 14.
887 At 15.
888 At 17.
889 At 18.
890 Heemi Taumaunu, Chief District Court Judge of New Zealand "Mai Te Pō Ki Te Ao Mārama: The Transition from Night to the Enlightened World" (Norris Ward McKinnon Annual Lecture 2020, The University of Waikato, 10 December 2020) at 5–6.

imprisonment, are imposed."[891] He acknowledged that the courts have failed to understand and protect those before it, citing the overrepresentation of Māori across all negative indices of the justice system. The model builds on practices developed in specialist courts (i.e., alcohol and other drug treatment courts), including:

A. Focus on social, psychological, emotional, and physical underlying causes of crime
B. Referral pathways for tailored rehabilitation or treatment
C. Wider community, iwi and stakeholder involvement in court
D. Heightened interagency coordination
E. Use of plain language in court
F. Kaupapa Māori approaches in the mainstream
G. Exploration of a new Kaitakawaenga (coordinator) role between the court, participants and services
H. Greater use of cultural speakers through s 27 of the Sentencing Act.

The model is designed in partnership with iwi and local communities, allowing courts to "fit the specific needs of each community. It is not a one-size fits all approach."[892] As a relatively new initiative, it will be interesting to see how Pacific peoples respond to this model as it rolls out nationwide and whether the processes embedded in Tikanga and Te Ao Māori are effective for reducing offending by our people, too.

891 At 6.
892 At 24 and 32.

Emerging Issues

Having reviewed the extant literature, several issues and questions have emerged for further consideration. As expressed in the introduction, we anticipated that this report would raise more questions than answers in the hopes of helping unfurl new avenues of inquiry. While it is impossible to consider every possible angle to the preceding topics, the following issues recurred as the dominant discussion points.

The Research is There, But it is Not Being Actioned

As we wrote this report, it became apparent that there is a sizeable body of research discussing Pacific peoples' experiences of the justice system. However, much of it remains out of public view. For example, we identified several reports across 20 years that government agencies commissioned to explore issues relating to Pacific criminality that also provided explicit recommendations for the issues identified. We urge that the following material be addressed in discussions about the justice system:

- The Justice Sector Pacific Reference Group *Effective Interventions: Draft Programme of Action for Pacific Peoples* and findings from their various fono with Pacific offenders. We also believe their work should be made freely available to the public.
- Keneti Apa's *Report on Research into Characteristics of Rehabilitation Programmes which are Most Successful in Engaging Pacific Islands Offenders.* We also believe this report should be made freely available to the public.
- Judge Ida Malosi and Sandra Alofivae's report on *Women's Access to Justice: He putanga mo nga wahine ki te tika – Report on Consultation with Pacific Islands Women.* We also believe this report should be made freely available to the public.
- Dr ʻAna Hauʻalofaʻia Koloto's report into *The needs of Pacific Peoples when they are victims of crime*.
- Dylan Asafo's paper *Freedom Dreaming of Abolition in Aotearoa New Zealand: A Pacific Perspective on Tiriti-based Abolition* and the work of domestic abolitionist scholars and activists more generally.
- Finally, any historical strategies and/or plans developed by the Ministry of Justice and/or Corrections are independently re-examined to assess what has been implemented, what has not, and why.

From where we stand, one of the biggest obstacles to creating transformative change is the pervasiveness of government/institutional inertia. Successive governments continue to stockpile ground-breaking work without ever actioning transformative change. If those working in the system are so impenetrably wedded to maintaining the status quo, how do we make change? In light of this, we think it is essential to consider how our energy, resources and knowledge could be better placed outside of the research and policy contexts.

The Injustice is in the Minutiae

It is easy to point to highly publicised instances of miscarriages of justice as proof of the system's flaws. However, we believe that most injustices actually reveal themselves in the system's minutiae, often going unscrutinised until the matter reaches a crisis point. Our ever-expanding remand prisoner population exemplifies this phenomenon — a decade-long problem with its genesis in routine bail applications. By interrogating the system's everyday operations, we can grasp the issues at their root before they escalate into unmanageable quagmires.

Settler-Colonialism Throbs at the Heart of the Justice System

We wish to examine how settler-colonial dynamics might explain the overrepresentation of Pacific peoples in the justice system, given that the system is itself an apparatus of settler-colonialism. While some literature touches on colonisation in the Pacific more broadly, few analyses comprehensively explore how settler-colonial logic impacts diasporic Pacific peoples in Aotearoa New Zealand and, more specifically, within the justice system. We believe this analysis will help us better contextualise where/how we can position ourselves via-à-vis issues of constitutional transformation, Te Tiriti, and abolition.

Capitalism and Crime

The relationship between modern capitalism and crime has been comprehensively explored in the literature providing irrefutable evidence that those living in poverty are disproportionately criminalised, punished, victimised, and incarcerated.

Can critical theories on the criminalisation of poverty help explain why we, as Pacific peoples, engage in certain criminal offences? Moreover, to what extent has neoliberalism impacted our presence in the justice system since the 1980s?

Alcohol and Drug Offending

Offending involving alcohol and/or drugs by Pacific people have been in our justice statistics since the 1960s. What is driving our disproportionately higher drug and alcohol offending rates? Furthermore, is the justice system the appropriate intervention for this harm?

The Substantive Merits of Representation

The emphasis on hiring a racially diverse workforce is often touted as a 'win' by minoritised groups who have historically been disadvantaged from finding work in the legal profession, particularly at its most senior levels. Foregoing our discussion on diversity and the judiciary, we believe a more nuanced conversation is required around the symbolic value of representation, the politics of respectability, and whether putting more Brown people into positions of institutional power materially benefits the most marginalised members of our community.

Mental Health and the Justice System

Our people have some of the most damning mental health statistics when compared to all other ethnic groups in Aotearoa New Zealand.[893] Future research must explore the relationship between our mental well-being and our engagement with the justice system. What do our Knowledge Holders have to say about this?

Prison Abolition

As abolitionist theory gains traction in conversations around the transformation of the justice system, we ask whether abolition is workable under Aotearoa New Zealand's current constitutional arrangement. Moreover, how might we, as Pacific peoples, engage with abolitionist theory/praxis from our respective cultural, social, and economic position(s)?

Constitutional Transformation

Following the above, how might we contribute to the shaping of the justice system whilst also acknowledging that we are non-Indigenous peoples on this land with obligations to Te Tiriti? How might we draw upon the frameworks espoused in Matike Mai Aotearoa (The Independent Working Group on Constitutional Transformation) to guide this reimagining?[894]

893 See Health Promotion Agency *Te Kaveinga – Mental health and wellbeing of Pacific peoples: Results from the New Zealand Mental Health Monitor & Health and Lifestyles Survey* (June 2018).

894 Matike Mai Aotearoa *The Report on Constitutional Transformation* (2016).

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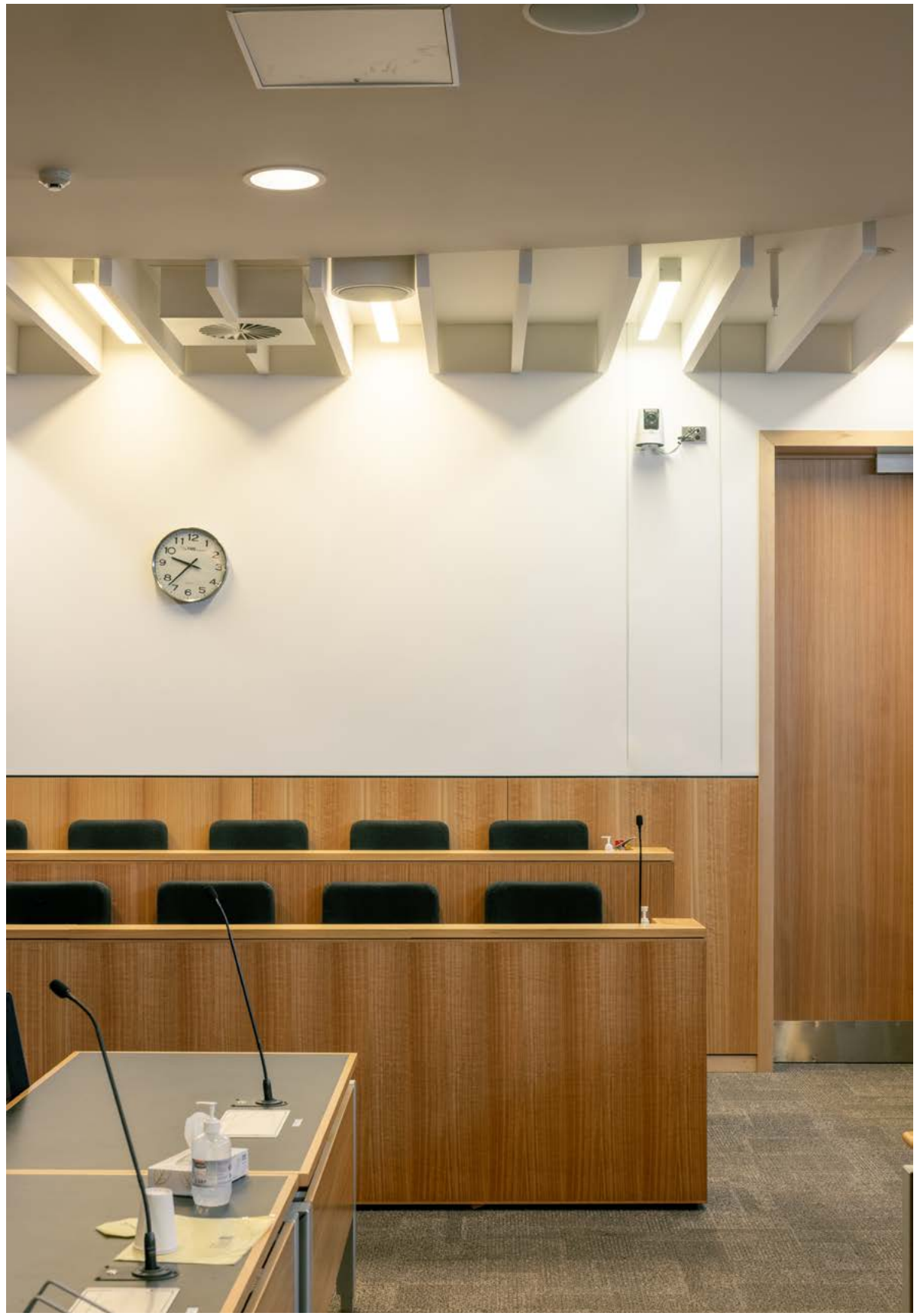
Annette King "Amanaki Pasifika Sexual Offending Programme launched" (press release, 12 April 2008).
Auckland Police Association "Police Action Regarding Illegal Immigrants" (press release, 25 October 1976).

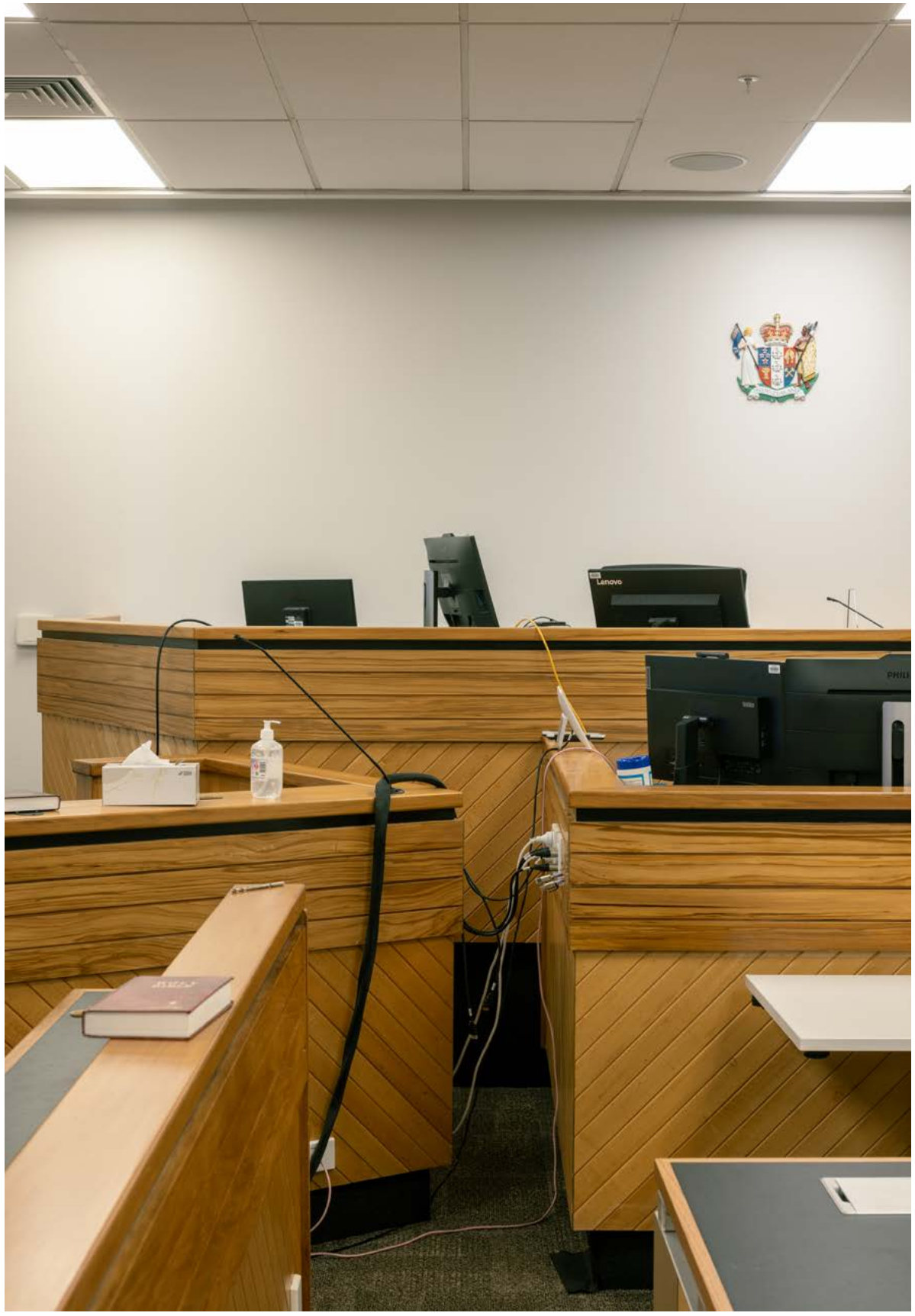
Jacinda Ardern and Aupito William Sio "Government offers formal apology for Dawn Raids" (press release, 1 August 2021).
Judith Collins "Collins delivers on tougher bail laws" (press release, 28 August 2013).

SPEECHES

"Crime in a Multiracial Society" (Criminology Seminar, Victoria University of Wellington, 1972)
Andrew Becroft, Principal Youth Court Judge of New Zealand "The Youth Courts of New Zealand in Ten Years Time: Crystal Ball Gazing or Some Realistic Goals for the Future?" (Paper presented to the National Youth Advocates/Lay Advocates Conference, Auckland, 13–14 July 2015).
Heemi Taumaunu, Chief District Court Judge of New Zealand "Mai Te Pō Ki Te Ao Mārama: The Transition from Night to the Enlightened World" (Norris Ward McKinnon Annual Lecture 2020, The University of Waikato, 10 December 2020).
Helen Winkelmann, Chief Justice of New Zealand "What Right Do We Have? Securing Judicial Legitimacy in Changing Times" (Dame Silvia Cartwright Address, Auckland, 17 October 2019).
Jacinda Ardern, Prime Minister of New Zealand "Speech to Dawn Raids Apology" (Auckland Town Hall, 1 August 2021).
JM McEwen "Understanding Polynesians" (Criminology Seminar, Victoria University of Wellington, 1972).
Luamanuvao Laban "Pacific Safer Communities & Crime Prevention Fono" (speech to the National Pacific Community Safety and Crime Prevention Fono, Wellington, 12 June 2007).
Moana Jackson, Sina-Brown Davis and Annette Sykes "Decarceration, Not Prison; Justness, not Justice; Constitutional Transformation, Not Treaty Settlements" (paper presented to Space, Race, Bodies II workshop, 6 May 2016).
Sian Elias, Chief Justice of New Zealand "Towards Justice: The rule of law as 'an unqualified human good'" (Sir John Graham Lecture, Auckland, 2018).
Tracey McIntosh "Prisoners, human rights, legislative measures and over-representation" (Inaugural Bishop Selwyn Forum, Auckland, 17 October 2015).


INSTANT HAND SANITIZER

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